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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 475

GUY T. HELVERING, COMMISSIONER OF INTERNAL
REVENUE, PETITIONER

vs.

DOROTHY K. G. ROGERS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 28, 1940
CERTIORARI GRANTED NOVEMBER 12, 1940

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GUY T. HELVERING VS. DOROTHY K. G. ROGERS 1

Before United States Board of Tax Appeals

Docket No. 84640

DOROTHY K. G. ROGERS, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket entries

Appearances: For Taxpayer—Ralph M. Andrews, Esq.; Dwight Taylor, Esq.; John L. Kenefick, Esq.; Ernest J. Brown, Esq. For Comm'r—B. M. Brodsky, Esq.; W. H. Schwatka, Esq.; E. L. Updike, Esq.

1936

May 25—Petition received and filed. Taxpayer notified. (Fee paid.)

May 25—Copy of petition served on General Counsel.

July 24—Answer filed by General Counsel.

July 31—Copy of answer served on taxpayer.

Sept. 5—Reply to answer filed by taxpayer. 9/8/36 copy served.

2 1937

July 20—Motion for circuit hearing at Buffalo, N. Y. Filed by General Counsel.

July 23—Hearing set August 18, 1937, on motion.

Aug. 18—Hearing had before Mr. Mellott on motion of respondent to consolidate dockets 61658, 62811, 63186, 63245, 51, 64523, 64908, 10 to 15, 24, 65011, 24, 65202, 65393, 71815, 16, 77824, 27 & 28, 84639, 40 & 41 and to deny his own motion for circuit hearing—granted. Motion filed at hearing.

Aug. 26—Hearing set Nov. 1, 1937.

Sept. 4—Notice of the appearance of Dwight Taylor as counsel for taxpayer filed.

Sept. 4—Motion for continuance until after Jan. 1, 1938, filed by taxpayer. 9/7/37 granted to Spring of 1938.

Dec. 14—Notice issued placing proceeding on Washington, D. C. Calendar.

1938

Oct. 7—Hearing set Dec. 5, 1938.

Nov. 28—Motion for a continuance to Dec. 14, 1938, or a date early in January 1939 filed by taxpayer. 11/30/38 granted to 12/14/38.

Dec. 13—Motion for leave to file amendment to petition, amendment to petition lodged by taxpayer.

Dec. 13—Copy of motion and amendments served on General Counsel.

Dec. 14—Hearing had before Mr. Murdock on merits. Submitted. On motion of respondent to file amended answer—granted. Motion of petitioner to file amended reply—granted. Motion and amendment to amended answer filed. Motion and amended reply filed. Stipulation of facts filed. Appearance of John L. Kenefick and Ernest J. Brown filed.

Dec. 28—Transcript of hearing of Dec. 14, 1938, filed.

3 1939

Jan. 12—Brief filed by taxpayer. 1/12/39 copy served.

Feb. 11—Brief filed by General Counsel.

Feb. 27—Reply brief filed by taxpayer. 3/11/39 copy served.

Mar. 21—Stipulation to correct transcript filed.

May 19—Memorandum opinion rendered, Mr. Murdock, Div. 3.
Decision will be entered under Rule 50.

June 13—Computation of deficiency filed by General Counsel.

June 15—Hearing set July 5, 1939, on settlement.

June 23—Consent to settlement filed by taxpayer.

June 30—Decision entered, J. E. Murdock. Div. 3.

Sept. 22—Petition for review by U. S. Circuit Court of Appeals
(2) with assignments of error filed by General Counsel.

Sept. 30—Proof of service filed by General Counsel. 3 for attorneys and 1 for taxpayer.

Oct. 10—Praecipe for record filed.

Oct. 20—Proof of service of filing praecipe filed by General Counsel. 3 for attorneys.

Oct. 21—Agreed amended praecipe for record filed with proof of service thereon.

4

Before United States Board of Tax Appeals

Docket No. 84640

[Same title.]

Petition

Filed May 25, 1936

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency dated February 27,

1936 (IT:AR:A-2 MEW-90D), and as a basis of her proceeding alleges as follows:

1. At all the times hereinafter mentioned petitioner was a resident of the County of Erie and State of New York.

2. The notice of deficiency (a copy of which is attached hereto marked "Exhibit A") was mailed to the petitioner on February 27, 1936.

3. The tax in controversy is an income tax for the calendar year 1933, and amounts to the sum of \$65,549.60.

4. The determination of tax set forth in said deficiency letter is based upon the following errors:

I

5 The determination by the Commissioner of Internal Revenue that a dividend of \$672.00 received by petitioner from the Great Southern Lumber Company was taxable to petitioner to the extent of 83.6544% thereof.

II

The determination by the Commissioner of Internal Revenue that, for the purpose of determining gain or loss, petitioner's cost basis on the sale during the calendar year 1933 of certain shares of the common stock of American Telephone & Telegraph Company and of certain corporate stock of the City of New York issued for water supply purposes (4 $\frac{1}{4}$'s of 1972), and of certain bonds of the County of Westchester (4 $\frac{1}{4}$'s of 1950 and 4 $\frac{1}{4}$'s of 1959) which petitioner had acquired from her father's testamentary trustees, and which had theretofore been purchased by said trustees, was the cost of said securities to said trustees.

III

The determination by the Commissioner of Internal Revenue that, for the purpose of determining gain or loss, petitioner's cost basis on the sale during the calendar year 1933 of certain shares of the capital stock of The Atchison, Topeka & Santa Fe Railway Company, which petitioner had acquired from her father's testamentary trustees, was as follows:

i. As to so much thereof as was purchased by her father prior to his death, the fair market value of said securities on the date of their distribution by her father's executors to her father's testamentary trustees.

ii. As to so much thereof as was purchased by her father's testamentary trustees, the cost thereof to said trustees.

IV

The determination by the Commissioner of Internal Revenue that, for the purpose of determining gain or loss, petitioner's cost basis on the sale during the calendar year 1933 of certain shares of the common capital stock of United States Steel Corporation and of certain corporate stock of the City of New York issued for water supply purposes (4 $\frac{1}{4}$'s of 1960), which petitioner had acquired from her father's testamentary trustees, and which had been purchased by her father prior to his death, was the fair market value of said securities on the date of the distribution thereof by her father's executors to her father's testamentary trustees.

V

The determination by the Commissioner of Internal Revenue that, for the purpose of determining gain or loss petitioner's cost basis on the sale during the calendar year 1933 of certain bonds of the City of Philadelphia (4's of 1946) and on the maturity during the calendar year 1933 of certain bonds of the City of Rochester (4 $\frac{1}{2}$'s of 1933), which petitioner had acquired from her father's testamentary trustees, and which had theretofore been purchased by her father's executors, was the fair market value of said securities on the date of the distribution thereof by her father's executors to her father's testamentary trustees.

VI

The determination by the Commissioner of Internal Revenue that, for the purpose of determining gain or loss, petitioner's cost basis on the sale during the calendar year 1933 of certain shares of the \$25.00 par value preferred stock of Buffalo, Niagara & Eastern Poyer Corporation, which petitioner had acquired from her father's testamentary trustees, and of certain shares of the common stock and warrants of Niagara Hudson Power Corporation which were derived from stock which petitioner had acquired from her father's testamentary trustees, is as follows:

- i. As to so much thereof as was purchased by her father's executors, the cost thereof to said executors.
- ii. As to so much thereof as was purchased by her father's testamentary trustees, the cost thereof to said trustees.

VII

The determination by the Commissioner of Internal Revenue that on petitioner's sale during the calendar year 1933 of 8,500

shares of the capital stock of F. W. Woolworth Company, petitioner derived a capital gain of \$269,771.67 instead of sustaining a capital loss of \$245,895.00, as claimed by petitioner on her return, upon the grounds:

i. That petitioner's holdings on the date of the sale of said stock of F. W. Woolworth Company had lost its identity, was incapable of identification, and, therefore, that the "first-in—first-out" rule should be applied; that in applying the "first-in—first-out" rule, the stock sold by her in 1933 must be deemed to have been sold out of lots acquired by her on August 26, 1924, from her father's testamentary trustees; and

8 ii. That petitioner's cost basis in the F. W. Woolworth Company stock distributed to her by her father's testamentary trustees, and which had theretofore been purchased by her father prior to his death, is the fair market value of said stock on July 1, 1921, the date of the distribution thereof by her father's executors to her father's testamentary trustees.

5. The facts upon which petitioner relies as the basis of this proceeding are as follows:

I

(a) On July 1, 1933, and for some time prior thereto petitioner was the owner of 224 shares of the capital stock of Great Southern Lumber Company, a Pennsylvania corporation with its principal office in the City of Harrisburg, Pennsylvania.

(b) Said Great Southern Lumber Company, in the year 1933, and for many years prior thereto, was the owner of a large quantity of long leaf yellow pine timber situated in the northern part of the State of Louisiana, and owned and operated a sawmill in the City of Bogalusa, Louisiana. In the year 1933 the corporation's land, to a very large extent, had been cut over and stripped of its stand, and in that year the corporation was approaching the end of its timber operation. During said year and for several years prior thereto the corporation had taken steps toward gradual liquidation.

(c) Prior to January 21, 1933, the Great Southern Lumber Company had an authorized issue of capital stock consisting of 160,000 shares of the par value of \$80.00 each, all of which said shares were common stock and amounted in the aggregate to \$12,800,000.00.

9 (d) At a meeting of the board of directors of the Great Southern Lumber Company held January 21, 1933, a meeting of the stockholders of said corporation was called to be held on April 26, 1933, for the purpose of voting upon a proposition for a reduction of the capital stock of said corporation from

\$12,800,000.00 to \$12,320,000.00, to be effected by a reduction of the par value of the corporation's shares from \$80.00 to \$77.00 per share. Said meeting of the stockholders was duly held on April 26, 1933, and the following resolutions were duly adopted:

"Resolved, That the capital of Great Southern Lumber Company be authorized to be reduced from \$12,800,000.00 to \$12,320,000.00, the same to be effected by a reduction in the par value of shares;

"Resolved, That the actual reduction in the said corporation's capital stock shall be made by its Board of Directors at such time as the said Board, in its discretion, shall determine."

* * * * *

"Resolved, That the par value of shares of capital stock of Great Southern Lumber Company be, and the same are, hereby authorized to be reduced from \$80.00 per share to \$77.00 per share, so that the capital stock of the company thereafter shall consist of 160,000 shares with a par value of \$77.00, aggregating, at par, \$12,320,000.00;

"Resolved, That the actual reduction in the par value of said shares of said corporation shall be made by its Board of Directors at such time as the said board, in its discretion, shall determine."

10 (e) The Judges' Returns of Election to reduce the capital stock and to change the par value of the corporation's shares were thereafter duly filed in the office of the Secretary of the Commonwealth of Pennsylvania.

(f) At a meeting of the board of directors of said Great Southern Lumber Company held on June 27, 1933, the following resolution was duly adopted:

"Resolved: That the capital stock of this Company be, and the same is hereby, actually reduced from \$12,800,000.00 to \$12,320,000.00;

"Resolved: That the par value of shares of capital stock of this company be, and the same is hereby reduced from \$80.00 share to \$77.00 per share."

(g) Thereafter, and in accordance with statutory proceedings for the reduction of capital stock and the reduction of par value of its shares, and as required by the laws of Pennsylvania, said Great Southern Lumber Company duly paid to its stockholders of record the sum of \$3.00 per share, charging said distribution to its capital stock account, and reducing its authorized and outstanding issue of capital stock accordingly. The par value of each certificate of outstanding capital stock of the corporation was changed from \$80.00 per share to \$77.00 per share.

(h) Petitioner duly deposited certificates representing said 224 shares of the capital stock of said Great Southern Lumber Company, and on July 1, 1933, a partial liquidating dividend of \$672.00 was duly paid to petitioner.

11 (i) Thereupon there was returned to petitioner certificates representing 224 shares, having a par value of \$77.00 per share. Petitioner credited the entire amount of said distribution to her personal capital account.

(j) The amount distributed by said Great Southern Lumber Company to petitioner, as aforesaid, was less than the fair market value of said stock on August 26, 1924, the date on which said stock was distributed to petitioner by her father's testamentary trustees, and was less than the fair market value of said stock on July 1, 1921, the date on which said stock was distributed by her father's executors to his testamentary trustees, as adjusted on account of intervening distributions from capital, and petitioner did not include any part of the amount so received in her taxable net income for the year 1933.

(k) The Commissioner of Internal Revenue, in his final determination, has included in petitioner's taxable net income an amount of \$562.16 of the total distribution of \$672.00 from said Great Southern Lumber Company, above described, upon the ground that 83.6544% of said distribution to petitioner was taxable to her.

II .

(1) Petitioner's father, Seymour H. Knox, died on May 16, 1915, leaving a last will and testament, by the provisions of which the testator, after directing payment of his debts and the making of certain specific bequests, provided, in part, as follows, with respect to the disposition of his residuary estate:

12 “(B) Twenty (20) percent of all the rest, residue and remainder of my said estate (not including, however, the shares of the capital stock of the six corporations mentioned in the first paragraph of this Article Twenty-first) I give, devise, and bequeath to my brother Henry D. Knox and Walter P. Cooke, both of the City of Buffalo, in trust nevertheless, for the following uses and purposes, to wit:

“To receive, hold and, from time to time, invest and reinvest the same, and to collect the rents, income, issues and profits on the property from time to time constituting such trust fund and to pay over so much of the net income arising therefrom, as to my trustees shall seem wise and proper toward the support, maintenance and education of my daughter, Dorothy Knox, until she shall arrive at the age of twenty-one (21) years, and to accumu-

late the balance of the income during her minority for her benefit, and to pay over such accumulated income to her when she shall arrive at the age of twenty-one (21) years, and thereafter to pay over the entire net income to my said daughter, Dorothy Knox, until she shall arrive at the age of twenty-eight (28) years, at which time I give, devise, and bequeath to my said daughter, Dorothy Knox, one-half ($\frac{1}{2}$) of the property then constituting said trust fund and I direct my said executors to pay over to my daughter, Dorothy Knox, the net income on the remaining one-half ($\frac{1}{2}$) of said trust fund until she shall arrive at the age of thirty-five (35) years, at which time I give, devise, and bequeath the remaining part of said trust fund to my said daughter, Dorothy Knox, and to her heirs and assigns forever.

"In the event that my said daughter, Dorothy Knox, shall die before reaching the age of thirty-five (35) years, I give, devise, and bequeath any part or portion of said trust fund, which has not then been paid over to her, or to the possession of which at the time of her death she was not entitled, unto the issue of said Dorothy Knox, if any, surviving her, to be divided among them, share and share alike. In case there be no issue her surviving, then I give, devise, and bequeath said trust fund unto her heirs."

(m) Pursuant to authority vested in them by the provisions of petitioner's father's will quoted above in paragraph II (l), said testamentary trustees bought the following securities on or about the dates and for the amounts hereinafter stated:

Date	Quantity	Security	Amount
Dec. 31, 1925	150 shares.....	American Telephone & Telegraph Company..	\$21,343.75
July 31, 1926	25 shares.....	do.....	2,568.75
July 31, 1928	29 shares.....	do.....	2,900.00
June 30, 1929	34 shares.....	do.....	5,673.92
July 30, 1930	34 shares.....	do.....	3,515.00
Jan. 31, 1926	\$16,000.00 face amount.....	City of New York $\frac{4}{8}$ s of 1972.....	16,180.00
June 30, 1924	\$25,000.00 face amount.....	County of Westchester $\frac{4}{8}$ s of 1950.....	25,768.75
June 30, 1924	\$25,000.00 face amount.....	County of Westchester $\frac{4}{8}$ s of 1950.....	25,901.25

(n) On or about August 26, 1931, said testamentary trustees distributed to petitioner, among other things, the following securities which have been heretofore referred to, and which, on said date, had a fair market value as hereinafter stated:

Quantity	Security	Unit price	Value
272 shares.....	American Telephone & Telegraph Company.....	171.875	\$46,750.00
\$16,000.00 face amount.....	City of New York $\frac{4}{8}$ s of 1972.....	105.575	16,860.00
\$25,000.00 face amount.....	County of Westchester $\frac{4}{8}$ s of 1950.....	106.72	27,160.00
\$25,000.00 face amount.....	County of Westchester $\frac{4}{8}$ s of 1950.....	111.20	27,822.00

(o) During the calendar year 1933 petitioner duly sold the above described securities on the dates and in the amounts hereinafter stated:

Date	Quantity	Security	Sale price
Dec. 21, 1933	272 shares.....	American Telephone & Telegraph Company...	\$29,635.57
July 27, 1933	\$16,000.00 face amount.....	City of New York 4 1/4's of 1972.....	12,900.00
Dec. 30, 1933	\$25,000.00 face amount.....	County of Westchester 4 1/4's of 1950.....	19,341.48
Dec. 30, 1933	\$25,000.00 face amount.....	County of Westchester 4 1/4's of 1959.....	17,968.75

(p) In her return for the calendar year 1933, which was filed with the Collector of Internal Revenue at Buffalo, New York, on or about March 15, 1934, petitioner reported capital losses on the sales of the above securities in the following amounts, and computed as follows:

Quantity	Security	Fair market value At g. 26, 1931	Sale price	Capital loss
272 shares.....	American Telephone & Telegraph Company.....	\$46,750.00	\$29,635.57	\$17,114.43
\$16,000.00 face amount.....	City of New York 4 1/4's of 1972.....	16,800.00	12,900.00	3,900.00
\$25,000.00 face amount.....	County of Westchester 4 1/4's of 1950.....	27,180.00	19,341.48	7,838.52
\$25,000.00 face amount.....	County of Westchester 4 1/4's of 1959.....	27,822.50	17,968.75	9,853.75

(q) The Commissioner of Internal Revenue has reduced petitioner's cost basis in the above-described securities and has reduced the capital losses claimed by her on the sales thereof in the following amounts:

American Telephone & Telegraph Company.....	\$10,747.98
City of New York 4 1/4's of 1972.....	680.00
County of Westchester 4 1/4's of 1950.....	1,411.25
County of Westchester 4 1/4's of 1959.....	1,921.25

The Commissioner of Internal Revenue has made said reductions upon the ground that petitioner's cost bases in the above securities are the costs thereof to the testamentary trustees of her father's estate.

III

(r) On the date of the death of petitioner's father, May 16, 1915, the latter was the owner of 500 shares of the common capital stock of The Atchison, Topeka & Santa Fe Railway Company, which had a fair market value on that date of and was appraised at \$49,625.

16 (s) Pursuant to the provisions of petitioner's father's will above quoted at paragraph II (l), 20% of said shares of stock of The Atchison, Topeka & Santa Fe Railway Company, or 100 shares, was distributed by the executors to the testamentary trustees for petitioner on July 1, 1921. Said stock had a fair market value on that date of \$80.50 per share, or a total value of \$8,050.

(t) Thereafter and on April 30, 1928, said testamentary trustees purchased 4 additional shares of said stock for \$400.

(u) Upon petitioner's attaining the age of 35 years on August 26, 1931, said testamentary trustees distributed said 104 shares of stock of The Atchison, Topeka & Santa Fe Railway Company to petitioner. On that date said shares had a fair market value of \$137.00 per share, or \$14,248.00.

(v) On November 27, 1933, petitioner duly sold said 104 shares, receiving therefor \$4,784.54.

(w) In her return for the calendar year 1933 petitioner claimed a capital loss of \$9,463.46 on the sale of said 104 shares of stock of The Atchison, Topeka & Santa Fe Railway Company, being the difference between the fair market value of said shares at the date they were distributed to her by her father's testamentary trustees, and the sale price thereof.

(x) The Commissioner of Internal Revenue, in his final determination, has determined that the petitioner's loss on said sale was \$3,665.46, being the difference between the fair market value of 100 of said shares on the date they were distributed to the testamentary trustees by the executors, plus the trustees' cost of the 4 shares purchased by them in 1928, and the sale price thereof.

IV

(y) On July, 1, 1921, the executors of petitioner's father's estate distributed to the testamentary trustees for petitioner, pursuant to the provisions of the will above quoted at paragraph II (l), 600 shares of the common capital stock of United States Steel Corporation, which, on that date, had a fair market value of \$74.50 per share, or a total fair market value of \$44,700.00 and \$10,000.00 face amount of the corporate stock of the City of New York issued for water supply purposes (4¼'s of 1960) which the Commissioner has determined had a fair market value on said date of \$10,075.00.

(z) Upon petitioner's attaining the age of 28 years on August 26, 1924, said testamentary trustees distributed to her said 600 shares of the common capital stock of United States Steel Cor-

poration which, on that date, had a fair market value of \$108.875 per share, or a total value of \$65,325.00.

(aa) Thereafter and on June 1, 1927, petitioner received a 40% stock dividend with respect to said 600 shares of the common capital stock of United States Steel Corporation, thereby increasing her holdings thereof to 840 shares.

(bb) Subsequently and on or about March 1, 1929, petitioner duly purchased an additional 160 shares of said stock, paying therefor \$30,295.00 in cash.

(cc) On or about June 7, 1929, petitioner purchased an additional 142 shares of said common capital stock of United States Steel Corporation, paying therefor \$19,880.00 in cash.

(dd) Upon petitioner's attaining the age of 35 years on August 26, 1931, said testamentary trustees distributed to her \$10,000.00 face amount of the corporate stock of the City of New York issued for water supply purposes (4¼'s of 1960) which, on that date, had a fair market value of \$104.6875 per \$100.00, or a total fair market value of \$10,468.75.

(ee) Thereafter and on or about November 27, 1933, petitioner duly sold all of said 1,142 shares of the common capital stock of said United States Steel Corporation for \$48,899.67 in cash.

(ff) Thereafter and on or about December 27, 1933, petitioner duly sold said \$10,000.00 face amount of the corporate stock of the City of New York issued for water supply purposes (4¼'s of 1960) for \$8,037.50.

(gg) In her return for the calendar year 1933 petitioner reported a capital loss on the sale of said United States Steel Corporation stock of \$66,600.33, being the difference between the fair market value of the 600 shares of said stock on August 26, 1924, the date on which they were distributed to petitioner by the testamentary trustees, plus the cost to her of 302 shares purchased by her, and the sale price thereof; and on the sale of said corporate stock of the City of New York of \$2,431.25, the amount of said loss being the difference between the fair market value of said corporate stock on the date it was distributed to petitioner by the testamentary trustees, and the sale price thereof.

19 (hh) The Commissioner of Internal Revenue, in his final determination, has determined that petitioner's capital loss on the sale of said United States Steel Corporation stock was \$45,975.33, and on the sale of said corporate stock of the City of New York was \$2,037.50, upon the ground that the proper basis, for tax purposes, in computing petitioner's gain or loss, was the fair market value on July 1, 1921, of so much of said securi-

ties as was acquired by petitioner from her father's testamentary trustees, and which was distributed to said trustees by her father's executors on said July 1, 1921.

V

(ii) On July 1, 1921, the executors of the estate of petitioner's father distributed to the testamentary trustees for petitioner, pursuant to the provisions of the will above quoted at paragraph II (l) \$50,000.00 face amount of the bonds of the City of Philadelphia, Pennsylvania (4's of 1946), and \$20,000.00 face amount of the bonds of the City of Rochester, New York (4½'s of 1933). Upon information and belief, the Commissioner of Internal Revenue has determined the fair market value of said City of Philadelphia bonds on the date of said distribution to be \$50,687.50, and of said City of Rochester bonds to be \$20,082.50.

(jj) When petitioner attained the age of 28 years on August 26, 1924, said testamentary trustees distributed the above-described bonds of the City of Philadelphia to petitioner. On that date said bonds had a fair market value of \$102.96 per \$100.00, or a total value of \$51,480.00.

(kk) When petitioner attained the age of 35 years on August 26, 1931, said testamentary trustees distributed said 20 bonds of the City of Rochester to petitioner. On that date said bonds had a fair market value of \$104.87 per \$100.00, or a total value of \$20,974.00.

(ll) On or about November 24, 1933, petitioner duly sold said bonds of the City of Philadelphia for \$42,406.25.

(mm) On or about June 14, 1933, said City of Rochester bonds matured and petitioner received in cash on the maturity date thereof \$20,000.00 in respect thereof.

(nn) In her return for the calendar year 1933 petitioner claimed a capital loss on the sale of the said City of Philadelphia bonds of \$9,073.75, and on the maturity of said City of Rochester bonds a capital loss of \$974.00, being the difference between the fair market value of said securities on the dates on which they were distributed to petitioner by the testamentary trustees, and the amounts received therefor by the petitioner during the calendar year 1933.

(oo) The Commissioner of Internal Revenue, in his final determination, has determined that petitioner's loss on the sale of said bonds of the City of Philadelphia was \$8,281.25, and on the maturity of the said bonds of the City of Rochester was \$82.50, being the difference between the fair market value of said securities on the date on which they were distributed by peti-

tioner's father's executors to his testamentary trustees, and the amounts received therefor by petitioner during the calendar year 1933.

VI

(pp) On June 15, 1925, the executors of the estate of petitioner's father distributed to the testamentary trustees for
21 petitioner, pursuant to the provisions of the will above quoted at paragraph II (1), 214 shares of the common capital stock of Niagara, Lockport & Ontario Power Company, which had theretofore cost said executors \$4,537.06. Said 214 shares had a fair market value on said June 15, 1925, of \$76.00 per share, or an aggregate value of \$16,264.00.

(qq) Thereafter and on or about August 1, 1925, said testamentary trustees exchanged said 214 shares of Niagara, Lockport & Ontario Power Company common stock for 267½ shares of the preferred stock and 267½ shares of the common stock of Buffalo, Niagara & Eastern Power Corporation, said exchange being pursuant to a plan of reorganization to which both said Niagara, Lockport & Ontario Power Company and Buffalo, Niagara & Eastern Power Corporation were parties. On the date of said exchange the fair market value of said common stock of Buffalo, Niagara & Eastern Power Corporation was \$42.375 per share and of the preferred stock of said corporation was \$24.375 per share.

(rr) Thereafter and on August 31, 1925, said testamentary trustees purchased for \$1,202.50, 32½ additional shares of the common stock of said Buffalo, Niagara & Eastern Power Corporation, bringing their total holdings of said common stock to 300 shares.

(ss) On the same date said testamentary trustees purchased 32½ shares of the \$25.00 par value preferred stock of Buffalo, Niagara & Eastern Power Corporation, paying therefor \$780.25.

(tt) Subsequently and on or about January 31, 1926, said
22 testamentary trustees purchased 75 shares of the Class A common stock of said Buffalo, Niagara & Eastern Power Corporation paying therefor \$1,500.

(uu) On August 19, 1929, said testamentary trustees exchanged said 300 shares of common stock of Buffalo, Niagara & Eastern Power Corporation above referred to for 1,200 shares of the common capital stock of Niagara Hudson Power Corporation and 300 class A option warrants of said Niagara Hudson Power Corporation which warrants entitled the holder to purchase at any time on or before October 1, 1944, one share of the corporation's common stock at \$35 per share for each warrant held.

(vv) On the same date, August 19, 1929, said testamentary trustees exchanged 75 shares of the Class A common stock of said Buffalo, Niagara & Eastern Power Corporation above referred to for 300 shares of the common capital stock of Niagara Hudson Power Corporation and 75 Class A option warrants of said Niagara Hudson Power Corporation which warrants entitled the holder to purchase at any time on or before October 1, 1944, one share of the corporation's common stock at \$35 per share for each warrant held.

(wv) On said date, August 19, 1929, common stock of said Niagara Hudson Power Corporation had a fair market value of \$26.8125 per share and the Class A option warrants had a fair market value on that date of \$9.125 each. Said exchange was pursuant to a plan of reorganization to which both Buffalo, Niagara & Eastern Power Corporation and Niagara Hudson Power Corporation were parties.

23 (xx) Thereafter and on August 26, 1931, the date on which petitioner attained the age of thirty-five years, said testamentary trustees distributed to petitioner said 1,500 shares of common stock and 375 Class A option warrants of Niagara Hudson Power Corporation and 300 shares of \$25 par value Buffalo, Niagara & Eastern Power Corporation preferred stock. On that date the Niagara Hudson Power Corporation common stock had a fair market value of \$10.375, or a total fair market value of \$15,562.50, the Class A option warrants of Niagara Hudson Power Corporation a fair market value of \$1.75, or a total fair market value of \$656.25, and the \$25 par value preferred stock of Buffalo, Niagara & Eastern Power Corporation, a fair market value of \$27 per share, or a total fair market value of \$8,100.

(yy) Thereafter and on August 8, 1932, pursuant to corporate action taken by the corporation to reduce its capital stock from 45,000,000 shares of the par value of \$10 each to 15,000,000 shares of a par value of \$15 each, petitioner exchanged her 1,500 shares of old common stock of Niagara Hudson Power Corporation, having a par value of \$10 each, for 500 new shares of common stock of said corporation having a par value of \$15 each, reducing her holdings of such common stock to 500 shares. A corresponding reduction was accomplished in the number of outstanding Class A option warrants, by a similar exchange of one for three, petitioner's holdings thereof being reduced to 125 warrants.

(zz) Subsequently and on December 21, 1933, petitioner duly sold said 500 shares of the common stock of Niagara Hudson Power Corporation for \$2,394.50, said 125 class A option
24 warrants of said corporation for \$39.97, and said 300 shares

of the \$25 par value preferred stock of Buffalo, Niagara & Eastern Power Corporation for \$4,750.50.

(aaa) On her return for the calendar year 1933, petitioner reported capital losses on account of the sale of said securities, as follows:

500 shares Niagara Hudson common	\$13,178.00
125 Niagara Hudson Class A Option Warrants	616.28
300 shares Buffalo, Niagara & Eastern Power Corporation Preferred	3,349.50

said losses representing the difference between the fair market value of said securities on August 26, 1931, the date of distribution thereof to the petitioner by the testamentary trustees, and the sale price thereof.

(bbb) The Commissioner of Internal Revenue in his final determination has adjusted said capital losses to the following:

500 shares Niagara Hudson common stock (Loss)	\$3,188.27
125 Niagara Hudson Class A Option Warrants (Gain)	39.97
300 shares Buffalo, Niagara & Eastern Power Corporation Preferred (Gain)	2,313.46

(ccc) In determining the adjusted loss on the Niagara Hudson common stock the Commissioner has used that part of the executors' cost of the 214 shares of Niagara, Lockport & Ontario Power Company common stock, referred to above, which is allocable to the 267½ shares of the common stock of Buffalo, Niagara & Eastern Power Corporation received by the trustees on the exchange of August 1, 1925, plus the trustees' cost of the 32½ additional shares of common stock of Buffalo, Niagara & Eastern Power Corporation purchased by them on August 31, 1925, plus the trustees' cost of the 75 shares of Class A common stock of Buffalo, Niagara & Eastern Power Corporation purchased by them on January 31, 1928, or an aggregate adjusted cost basis of \$5,582.77.

(ddd) The Commissioner has treated the entire proceeds of the sale of Class A option warrants as a capital gain.

(eee) In determining a gain on the sale of the preferred stock of Buffalo, Niagara & Eastern Power Corporation, the Commissioner has used as the cost basis that part of the executors' cost of the 214 shares of the common capital stock of Niagara, Lockport & Ontario Power Company which is allocable to the 267½ shares of preferred stock of Buffalo, Niagara & Eastern Power Corporation received by the trustees on the exchange of August 1, 1925, plus the cost to the trustees of the 32½ shares of Buffalo, Niagara & Eastern Power Corporation preferred stock purchased by them on August 31, 1925, or an aggregate adjusted cost basis of \$2,437.04.

VII

(fff) On July 1, 1921, petitioner's father's executors distributed to the testamentary trustees for petitioner, in accordance with the terms of the will quoted above, 4,960 shares of the par value of \$100.00 per share of the F. W. Woolworth Company which
26 on that date had a fair market value of \$110.00 per share, or an aggregate fair market value of \$545,600.00. Subsequently and on or about June 30, 1924, said trustees, pursuant to proper corporate action by which reduction in the par value of shares from \$100.00 to \$25.00 was accomplished, exchanged said 4,960 shares of \$100.00 par value of F. W. Woolworth Company stock for 19,840 shares of \$25.00 par value of stock of said company.

(ggg) Upon petitioner becoming 28 years of age on August 26, 1924, said trustees distributed to her 9,920 of said new shares which on that date had a fair market value of \$113.875 per share, or a total fair market value of \$1,129,640.

(hhh) Of the 9,920 shares retained by the trustees 400 were sold at a profit in 1925. In the same year the trustees purchased 480 additional shares at an aggregate cost of \$92,500. On February 1, 1927, the corporation declared a 50% stock dividend, the trustees receiving thereon 5,000 shares bringing their total holdings to 15,000. On June 24, 1929, after proper corporate action further reducing the par value of the corporation's shares from \$25 to \$10 per share, the trustees exchanged said 15,000 shares of \$25 par value for 37,500 new shares of \$10 par value.

(iii) Upon petitioner attaining the age of 35 years on August 26, 1931, said trustees duly distributed to her said 37,500 shares of \$10 par value of F. W. Woolworth Company stock which on that date had a fair market value of \$68 per share, or a total fair market value of \$2,550,000.

(jjj) On December 27, 1933, petitioner duly sold from the lot of 37,500 shares of \$10 par value of F. W. Woolworth Company stock acquired by her from her testamentary trustees on August
26, 1931, 8,500 shares for \$332,105.

27 (kkk) In her return for the calendar year 1933, petitioner claimed a capital loss on said sale of \$245,895, being the difference between the fair market value of said shares on August 26, 1931, the date on which they were distributed to her by the testamentary trustees, and the sale price thereof.

(lll) The Commissioner of Internal Revenue has disallowed said capital loss and has determined a capital gain of \$269,771.67 on the ground that as the result of the exchange on the basis of

2 1/2 for 1 which occurred on June 24, 1929, the identity of petitioner's shares of F. W. Woolworth Company stock was lost; that the "first in-first out" rule must be applied; and, therefore, that the 8,500 shares sold on December 27, 1933, must be deemed to have been out of the lot of 9,920 shares of \$25 par value (which subsequently became 37,200 shares of a par value of \$10 per share) distributed to the petitioner by the testamentary trustees on August 26, 1924.

6. Wherefore, petitioner prays that this Board may hear the proceeding and determine that:

I

The distribution of Great Southern Lumber Company received by petitioner during the calendar year 1933 was a partial liquidating dividend of said Great Southern Lumber Company, properly chargeable to the corporation's capital stock account and was not a distribution of earnings or profits taxable to petitioner under the provisions of the Revenue Act of 1932.

II

For the purpose of determining gain or loss on petitioner's sale during the calendar year 1933 of certain shares of the common stock of American Telephone and Telegraph Company, certain corporate stock of the City of New York (4 1/4's of 1972) and certain bonds of the County of Westchester (4 1/4's of 1950 and 4 1/4's of 1959), petitioner's cost basis is the fair market value of said securities on August 26, 1931, the date on which they were distributed to petitioner by her father's testamentary trustees.

III

For the purpose of determining gain or loss on petitioner's sale during the calendar year 1933 of certain shares of the capital stock of The Atchison, Topeka and Santa Fe Railway Company, petitioner's cost basis is the fair market value of said securities on August 26, 1931, the date on which they were distributed to petitioner by her father's testamentary trustees.

IV

For the purpose of determining gain or loss on petitioner's sale during the calendar year 1933 of certain corporate stock of the City of New York (4 1/4's of 1960) and certain shares of

the capital stock of United States Steel Corporation, petitioner's cost basis is the fair market value of said securities on August 26, 1931, and August 26, 1924, respectively, the dates on which said securities were distributed to petitioner by her father's testamentary trustees.

V

For the purpose of determining gain or loss on petitioner's sale during the calendar year 1933 on certain bonds of the City of Philadelphia, Pennsylvania (4's of 1946) and of the City of Rochester, New York (4½'s of 1933), petitioner's cost basis is the fair market value of said bonds on August 26, 1924, the date on which said securities were distributed to petitioner by her father's testamentary trustees.

VI

For the purpose of determining gain or loss on petitioner's sale during the calendar year 1933 of certain shares of the common stock of Niagara Hudson Power Corporation, certain Class A option warrants of said corporation and certain shares of the \$25 par value preferred stock of Buffalo, Niagara & Eastern Power Corporation, petitioner's cost basis is the fair market value of the said securities on August 26, 1931, the date on which said securities were distributed to petitioner by her father's testamentary trustees.

VII

On the sale during the calendar year 1933 of 8,500 shares of \$10 par value stock of F. W. Woolworth Company, petitioner sustained a capital loss of \$245,895, that said stock was sold out of the lot of 37,500 shares of \$10 par value acquired by petitioner from her father's testamentary trustees on August 26, 1931, and that petitioner's cost basis in said stock is the fair market value thereof on said August 26, 1931, the date on which it was distributed to her by her father's testamentary trustees.

(S) RALPH M. ANDREWS,

Counsel for Petitioner,

*Office and Post Office Address, 1330 Marine Trust Building,
239 Main Street, Buffalo, New York.*

30 [Duly sworn to by Dorothy K. G. Rogers; jurat omitted
in printing.]

31

Exhibit A annexed to petition

SN-A

TREASURY DEPARTMENT,

Washington, Feb. 27, 1936.

Office of Commissioner of Internal Revenue. Address Reply
to Commissioner of Internal Revenue and Refer to—

Mrs. DOROTHY K. G. ROGERS,

706 Marine Trust Building, Buffalo, New York.

MADAM: You are advised that the determination of your income tax liability for the taxable year 1933 discloses a deficiency of \$65,549.60 as shown in the statement attached.

In accordance with section 272 (a) of the Revenue Act of 1932, as amended by section 501 of the Revenue Act of 1934, notice is hereby given of the deficiency mentioned. Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the
32 attention of IT:C:P-7. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,
Commissioner.By CHAS. T. RUSSELL,
Deputy Commissioner.

Enclosures:

Statement.

Form 870.

STATEMENT

IT:AR:A-2.

MEW-90D.

In re: Mrs. Dorothy K. G. Rogers,
706 Marine Trust Building,
Buffalo, New York.

Income Tax Liability

Year, 1933. Income Tax Liability, \$65,549.60. Income Tax
Assessed, None. Deficiency, \$65,549.60.

33 The deficiency shown herein is based upon the report dated November 1, 1935, prepared by Revenue Agent H. E. Murray, a copy of which was transmitted to you under date of December 2, 1935.

A synopsis of your adjusted income tax liability follows:

Income shown on the return exclusive of capital net loss	\$161,099.18
Add:	
1. Loss on sales decreased	98.00
2. Dividends increased	562.16
	<hr/>
	\$161,759.34
Less: 3. Contribution deduction	3,380.24
	<hr/>
Adjusted income for surtax	\$158,379.10
Less: Dividends	194,069.56
	<hr/>
Balance subject to normal tax	-None
Surtax on \$158,379.10	\$50,565.76
Tax at 12½% on adjusted capital net gain of \$120,002.70	15,000.34
	<hr/>
Total tax	\$65,566.10
34 Brought forward	\$65,566.10
Less: Tax paid at source	16.50
	<hr/>
Corrected income tax liability	\$65,549.60
Income tax assessed, original, account #660359	None
	<hr/>
Deficiency of tax	\$65,549.60

Explanation of Changes

1. Income is increased and loss on sales decreased by eliminating the value of \$98.00 on 28 Niagara Share warrants. Since the warrants were not exercised but allowed to lapse, no adjustment should be made on account thereof when the stock is sold.

2. Dividends have been increased by \$562.16 which is 83.6544% of \$672.00 received from the Great Southern Lumber Co., representing the taxable portion of the dividends distributed by the company in the year 1933.

3. Contribution deduction of \$3,380.24 is allowed.

Capital net loss reported as \$445,164.29 has been changed to a capital net gain of \$120,002.70 or a net increase of \$565,166.99 due mainly to adjustments to the cost basis used or applicable to the securities sold.

It is noted that in the sale of the securities, which you received from the Dorothy Knox Trust, you used the values as at August 26, 1924, or August 26, 1931, the dates the trustee transferred the stocks to you.

35 The Bureau has used the fair market values as at July 1, 1921, for the securities transferred to the trustees when the trust was set up or the actual costs to the trustee of stocks purchased by him. The trust was created under the will of Seymour H. Knox, who died on May 16, 1915.

Section 113 (a) (5) of the Revenue Act of 1932 provides that the cost basis of property acquired by general bequest shall be its fair market value at the time of distribution to the beneficiary.

The date of distribution is held to be July 1, 1921, the date the securities were transferred by the executor of the estate to the trustee. Under General Counsel Memorandum 14893 (Internal Revenue Bulletin XIV No. 21, page 11), on July 1, 1921, you actually entered into possession of the income of the property and later to the possession of the property of its equivalent.

An analysis of your account with the Woolworth stock shows that through the 2½-for-1 exchange in 1929, the identity of your various holdings in this stock was lost. Therefore, in accordance with article 600 (4) of Regulations 77, the 8,500 shares sold in 1933 have been held to have come from the earliest acquisitions of the stock. This adjustment, which comprises the greater portion of the increase of \$565,166.99, is as follows:

8,500 shares value at August 26, 1931, used by you	\$578,000.00
Value at July 1, 1921, of 566½ shares at 100 (represented by the 8,500 shares sold)	62,333.33
Cost overstated	\$515,666.67

In compliance with your letter of February 4, 1936, this final notice of deficiency is now being forwarded.

36 Before United States Board of Tax Appeals

Docket No. 84640

[Same title.]

Answer

Filed July 24, 1936

The Commissioner of Internal Revenue by his attorney, Herman Oliphant, General Counsel for the Department of the Treasury, for answer to the petition filed in the above-entitled appeal, admits, denies, and avers as follows:

1 and 2. Admits the allegations contained in paragraphs 1 and 2 of the petition.

3. Admits that the tax in controversy is an income tax for the calendar year 1933 and that the Commissioner determined a deficiency amounting to \$65,549.60. Denies that the entire amount thereof is in controversy.

4. I. Admits that the Commissioner determined that a dividend of \$672.00 received by petitioner from the Great Southern Lumber Company is taxable to the petitioner to the extent of 83.6544% thereof. Denies that the Commissioner thereby erred.

II. Admits that the Commissioner determined that petitioner's basis for determining gain or loss on the sale during 1933 of certain shares of common stock of American Telephone and Telegraph Company, certain bonds of the City of New York (4 $\frac{1}{4}$'s of 1972), and certain bonds of the County of Westchester was the cost of said securities to the trustees of a testamentary trust of which petitioner was the sole beneficiary. Denies that the Commissioner thereby erred.

III. Admits that the Commissioner determined that the petitioner's basis for determining gain or loss on the sale during 1933 of certain shares of stock of The Atchison, Topeka & Santa Fe Railway Company was as follows: As to the shares owned by petitioner's father on the date of his death, the fair market value thereof on the date of their distribution by her father's executors; and as to the shares acquired by the trustees of said testamentary trust, the cost thereof to the trustees. Denies that the Commissioner thereby erred.

IV. Admits that the Commissioner determined that petitioner's basis for determining gain or loss on the sale during 1933 of certain shares of the common stock of United States Steel Corporation, and certain bonds of the City of New York (4 $\frac{1}{4}$'s of 1960) was the fair market value thereof on the date said securities were distributed by the executors of her father's estate. Denies that the Commissioner thereby erred against the petitioner, and avers that the Commissioner erred in favor of the petitioner by overvaluing the aforesaid bonds of the City of New York.

V. Admits that the Commissioner determined that petitioner's basis for determining gain or loss on the sale during 1933 of certain bonds of the City of Philadelphia (4's of 1946), and on the maturity during 1933 of certain bonds of the City of Rochester (4 $\frac{1}{2}$'s of 1933) was the fair market value thereof on the date said securities were distributed by the executors of her father's estate. Denies that the Commissioner thereby erred.

VI. Denies all allegations contained in subparagraph VI of paragraph 4 of the petition.

VII. Admits that the Commissioner determined that on the sale during the calendar year 1933 of 8,500 shares of F. W. Woolworth Company petitioner derived a capital gain of \$269,771.67, instead of sustaining a capital loss of \$245,895.00 as

claimed by petitioner on her return; that the Commissioner determined that the shares sold were derived from stock distributed on July 1, 1921 by the executors of her father's estate; and that the Commissioner determined that petitioner's basis for the stock sold was the fair market value on July 1, 1921 of the shares from which the 8,500 shares were so derived. Denies that the Commissioner thereby erred, and denies all other allegations contained in subparagraph VII of paragraph 4 of the petition.

5. I (a). Admits that on July 1, 1933, and for some time prior thereto petitioner was the owner of 224 shares of the capital stock of Great Southern Lumber Company. Denies all other allegations contained in subparagraph I (a) of paragraph 5 of the petition.

I (b). Admits that Great Southern Lumber Company in the year 1933 and for many years prior thereto, was the owner of a large quantity of long leaf yellow pine timber situated in the northern part of the state of Louisiana, and owned and operated a sawmill in the city of Bogalusa, Louisiana. Denies all other allegations contained in subparagraph I (b) of paragraph 5 of the petition.

39 I (c), (d), (e), and (f). Denies all the allegations contained in subparagraphs I (c), (d), (e), and (f) of paragraph 5 of the petition.

I (g). Admits that on or about July 1, 1933, Great Southern Lumber Company paid \$672.00 to the petitioner. of record the sum of \$3.00 per share. Denies all other allegations contained in subparagraph I (g) of paragraph 5 of the petition.

I (h) and (i). Admits that on July 1, 1933, the Great Southern Lumber Company paid \$672.00 to the petitioner. Denies all other allegations contained in subparagraphs I (h) and (i) of paragraph 5 of the petition.

I (j). Admits that petitioner did not include any part of the amount so received in her taxable income for the year 1933. Denies all other allegations contained in subparagraph I (j) of paragraph 5 of the petition.

I (k). Admits the allegations contained in subparagraph I (k) of paragraph 5 of the petition.

II (l). Admits that petitioner's father, Seymour H. Knox, died on May 16, 1913, leaving a last will and testament, by which 20% of the residue of the estate (not including certain bank stocks) was devised and bequeathed in trust for the benefit of the petitioner. Denies all other allegations contained in subparagraph II (l) of paragraph 5 of the petition.

II (m). Admits that during the years 1924 to 1930, inclusive, the trustees of the aforesaid testamentary trust acquired

40 for petitioner's benefit the securities described in subparagraph II (m) of paragraph 5 of the petition; and admits that the cost of said securities to the trustees was as stated in the said subparagraph. Denies all other allegations, if any, contained in subparagraph II (m) of paragraph 5 of the petition.

II (n). Admits that on or about August 26, 1931, the testamentary trustees delivered to the petitioner the securities referred to in subparagraph II (m) of paragraph 5 of the petition. Denies all other allegations contained therein.

II (o). Admits the allegations contained in subparagraph II (o) of paragraph 5 of the petition.

II (p). Admits that in her return for the calendar year 1933, which was filed with the Collector of Internal Revenue at Buffalo, New York, on or about March 15, 1934, petitioner reported capital losses on the sales of said securities in the amounts stated in the last column of the tabulation contained in subparagraph II (p) of paragraph 5 of the petition. Admits that the amounts thereof were computed as stated in said tabulation. Denies all other allegations contained in said subparagraph.

II (q). Admits that the Commissioner has reduced the basis claimed by the petitioner in her return in respect of said securities and has reduced the capital losses claimed by her on the sales thereof in the amounts stated in subparagraph II (q) of paragraph 5 of the petition. Admits that said reductions were made on the ground that petitioner's basis for said securities was the cost thereof to the testamentary trustees. Denies all other allegations contained in said subparagraph.

41 III (r). Admits the allegations contained in subparagraph III (r) of paragraph 5 of the petition.

III (s). Admits that on or about July 1, 1921, the executors distributed certain shares of the capital stock of The Atchison, Topeka & Santa Fe Railway Company pursuant to the terms of the last will and testament of petitioner's father, and transferred 100 of said shares to the testamentary trustees of a trust of which petitioner was the sole beneficiary. Admits that on July 1, 1921, the fair market value of said 100 shares of stock was \$8,050.00. Denies all other allegations contained in subparagraph III (s) of paragraph 5 of the petition.

III (t). Admits that on April 30, 1928, said testamentary trustees acquired by the exercise of stock rights 4 additional shares of said stock for \$400.00.

III (u). Admits that upon petitioner attaining the age of 35 years on August 26, 1931, the testamentary trustees transferred said 104 shares of stock of The Atchison, Topeka & Santa Fe

Railway Company to petitioner. Denies all other allegations contained in subparagraph III (u) of paragraph 5 of the petition.

III (v). Admits the allegations contained in subparagraph III (v) of paragraph 5 of the petition.

III (w). Admits that on her income tax return for the year 1933 petitioner claimed a capital loss of \$9,463.46 on the sale of said 104 shares of stock. Denies all other allegations contained in subparagraph III (w) of paragraph 5 of the petition.

42 III (x). Admits that the Commissioner determined that petitioner sustained a capital loss on said sale of only \$3,665.46, the same being the difference between the fair market value of the 100 shares on July 1, 1921, plus the cost to the trustees of the 4 shares later acquired by them, and the sale price of \$4,784.54. Denies all other allegations contained in subparagraph III (x) of paragraph 5 of the petition.

IV (y). Admits that on July 1, 1921, the executors of petitioner's father's estate distributed certain shares of the common capital stock of United States Steel Corporation and transferred 600 shares thereof to the trustees of the testamentary trust of which petitioner was the sole beneficiary. Admits that on that date said 600 shares of stock had a fair market value of \$44,700.00. Admits that on said date said executors also distributed certain bonds of the City of New York (4¼'s of 1960) and transferred \$10,000.00 face value of said bonds to said testamentary trustees for petitioner. Admits that the Commissioner has determined that said bonds had a fair market value on July 1, 1921, of \$10,075.00, but avers that said determination of value was erroneous in that the fair market value of said bonds on said date was substantially less than said amount, to-wit: \$8,375.00. Respondent therefore alleges that the Commissioner thereby understated petitioner's capital net gain for the year 1933 by the amount of \$2,000.00. Except as herein admitted, respondent denies all allegations contained in subparagraph IV (y) of paragraph 5 of the petition.

IV (z). Admits that upon petitioner attaining the age of 28 years on August 26, 1924, said testamentary trustees transferred to her said 600 shares of common stock of United States Steel Corporation. Denies all other allegations contained in subparagraph IV (z) of paragraph 5 of the petition.

43 IV (aa), (bb), and (cc). Admits the allegations contained in subparagraphs IV (aa), (bb), and (cc) of paragraph 5 of the petition.

IV (dd). Admits that upon petitioner attaining the age of 35 years on August 26, 1931, said testamentary trustees transferred to her the aforesaid \$10,000.00 face amount of bonds of the City of New York (4¼'s of 1960). Denies all other allega-

tions contained in subparagraph IV (dd) of paragraph 5 of the petition.

IV (ee). Admits the allegations contained in subparagraph IV (ee) of paragraph 5 of the petition.

IV (ff). Admits that during 1933 petitioner sold said \$10,000.00 face amount of bonds of the City of New York for \$8,037.50.

IV (gg). Admits that in her return for the year 1933 petitioner reported a capital loss of \$66,600.33 on the sale of said 1,142 shares of United States Steel Corporation stock; and a capital loss of \$2,431.25 on the sale of said bonds of the City of New York. Denies all other allegations contained in subparagraph IV (gg) of paragraph 5 of the petition.

IV (hh). Admits that the Commissioner has determined the petitioner's capital losses on the aforesaid sales were \$45,975.33 and \$2,037.50, respectively, and that said determination 44 was based upon the ground that petitioner's basis for gain or loss in respect of said stock and bonds distributed by the executors of the estate and transferred to the aforesaid testamentary trustees on July 1, 1921, was the fair market value of said securities on that date, but avers that the Commissioner overvalued the aforesaid bonds as hereinabove alleged. Denies all other allegations contained in subparagraph IV (hh) of paragraph 5 of the petition.

V (ii). Admits that on July 1, 1921, the executors of the estate of petitioner's father distributed certain bonds of the City of Philadelphia and certain bonds of the City of Rochester, and transferred to the trustees of the aforesaid testamentary trust for petitioner's benefit the bonds described in subparagraph V (ii) of paragraph 5 of the petition. Admits that the Commissioner determined the fair market value of said bonds on July 1, 1921, to be the amounts stated in said subparagraph. Denies all other allegations therein contained.

V (jj) and (kk). Admits that when petitioner attained the age of 28 years on August 26, 1924, said testamentary trustees transferred the above-mentioned bonds of the City of Philadelphia to petitioner. Admits that when the petitioner attained the age of 35 years on August 26, 1931, said testamentary trustees transferred said bonds of the City of Rochester to petitioner. Denies all other allegations contained in subparagraphs V (jj) and (kk) of paragraph 5 of the petition.

V (ll) and (mm). Admits the allegations contained in subparagraphs V (ll) and (mm) of paragraph 5 of the petition.

V (nn). Admits that in her return for the calendar year 1933 petitioner claimed a capital loss of 9,073.75 on the

45 sale of said City of Philadelphia bonds, and a capital loss of \$974.00 on the maturity of said City of Rochester bonds. Denies all other allegations contained in subparagraph V (nn) of paragraph 5 of the petition.

V (oo). Admits that the Commissioner determined that petitioner's loss on the sale of the City of Philadelphia bonds was \$8,281.26, and on the maturity of the City of Rochester bonds \$82.50, the same being the difference between the fair market value of said securities on July 1, 1921, and the amounts received therefor by petitioner in 1933. Denies all other allegations contained in subparagraph V (oo) of paragraph 5 of the petition.

VI (pp). Admits that on or prior to June 15, 1925, the trustees of the aforesaid testamentary trust acquired for petitioner's benefit 214 shares of common stock of Niagara, Lockport & Ontario Power Company. Denies all other allegations contained in subparagraph VI (pp) of paragraph 5 of the petition.

VI (qq). Admits the allegations contained in subparagraph VI (qq) of paragraph 5 of the petition.

VI (rr). Admits that on August 31, 1925, the testamentary trustees purchased for \$1,202.50 321½ additional shares of the common stock of the Buffalo, Niagara & Eastern Power Corporation.

VI (ss) and (tt). Admits the allegations contained in subparagraphs VI (ss) and (tt) of paragraph 5 of the petition.

46 VI (uu) and (vv). Admits that in 1929 said testamentary trustees exchanged said 300 shares of common stock of Buffalo, Niagara and Eastern Power Corporation for 1,200 shares of the common capital stock of Niagara Hudson Power Corporation and 300 Niagara Hudson Power Corporation option warrants, and exchanged said 75 shares of Class A common stock of Buffalo, Niagara and Eastern Power Corporation for 300 shares of the common capital stock of Niagara Hudson Power Corporation and 75 Niagara Hudson Power Corporation option warrants. Denies all other allegations contained in subparagraphs VI (uu) and (vv) of paragraph 5 of the petition.

VI (ww). Admits that the exchanges mentioned in subparagraphs VI (uu) and (vv) above were transactions governed by the provisions of Sec. 112 (b) (3) or (b) (5) of the Revenue Act of 1928, and Sec. 113 (a) (6) of the Revenue Act of 1932; and that on the date said exchanges were made the stock and warrants received each had a substantial fair market value. Denies all other allegations contained in subparagraph VI (ww) of paragraph 5 of the petition.

VI (xx). Admits that on August 26, 1931, said testamentary trustees transferred to petitioner said 1,500 shares of common

stock and 375 option warrants of Niagara Hudson Power Corporation, and 300 shares of \$25.00 par value preferred stock Buffalo, Niagara and Eastern Power Corporation. Denies all other allegations contained in subparagraph VI (xx) of paragraph 5 of the petition.

VI (yy). Admits the allegations contained in subparagraph VI (yy) of paragraph 5 of the petition.

VI (zz). Admits that on or about December 21, 1933, petitioner sold said 500 shares of common stock of Niagara Hudson Power Corporation and said 125 option warrants of said corporation for a total consideration of \$2,434.47; and sold said 300 shares of the \$25.00 par value preferred stock of Buffalo, Niagara and Eastern Power Corporation for \$4,750.50. Denies all other allegations contained in subparagraph VI (zz) of paragraph 5 of the petition.

VI (aaa). Admits that in her return for the calendar year 1933 petitioner reported capital losses on account of the sale of said securities in the amounts set forth in subparagraph VI (aaa) of paragraph 5 of the petition. Denies all other allegations contained therein.

VI (bbb). Admits that the Commissioner determined that the petitioner sustained a capital loss in the net amount of \$3,148.30 from the sale of said 500 shares of common stock and said 125 option warrants of Niagara Hudson Power Corporation. Admits that the Commissioner determined that petitioner realized a capital gain of \$2,313.46 on the sale of said 300 shares of preferred stock of Buffalo, Niagara and Eastern Power Corporation. Denies all other allegations, if any, contained in subparagraph VI (bbb) of paragraph 5 of the petition.

VI (ccc) and (ddd). Admits that in determining the adjusted loss on the Niagara Hudson common stock and warrants the Commissioner has used an aggregate adjusted cost basis of \$5,582.77 based upon costs to said testamentary trustees. Denies all other allegations contained in subparagraphs VI (ccc) (ddd) of paragraph 5 of the petition.

VI (eee). Admits that in determining a gain on the sale of the preferred stock of Buffalo, Niagara and Eastern Power Corporation the Commissioner has used an aggregate cost basis of \$2,437.04, based upon costs to said testamentary trustees. Denies all other allegations contained in subparagraph VI (eee) of paragraph 5 of the petition.

VI (fff). Admits that on July 1, 1921, petitioner's father's executors distributed certain shares of \$100.00 par value common stock of the F. W. Woolworth Company, and transferred to the trustees of the testamentary trust for petitioner's benefit 4,960

shares thereof. Admits the said shares on that date had a fair market value of \$110.00 per share or an aggregate fair market value of \$545,600.00. Admits that on or about June 30, 1924, said trustees, pursuant to corporate action for the reduction in par value of said shares, exchanged the 4,960 shares of \$100.00 par value stock for 19,840 shares of common stock of said company of the par value of \$25.00 per share. Denies all other allegations contained in subparagraph VII (fff) of paragraph 5 of the petition.

VII (ggg). Admits that upon petitioner becoming 28 years of age August 26, 1924, said trustees transferred to her 9,920 of said shares of \$25.00 par value stock. Denies all other allegations contained in subparagraph VII (ggg) of paragraph 5 of the petition.

VII (hhh). Admits that the trustees increased their holdings of the remaining stock from 9,920 shares to 10,000 shares. Admits that in 1927 the F. W. Woolworth Company declared a 50% stock dividend. Admits that in 1929 the corporation further reduced the par value of its common shares from \$25.00 to \$10.00 per share and issued to its stockholders $2\frac{1}{2}$ new shares for 49 each old share of \$25.00 par value stock. Denies all other allegations contained in subparagraph VII (hhh) of paragraph 5 of the petition.

VII (iii). Admits that upon petitioner attaining the age of 35 years on August 26, 1931, said trustees transferred to her 37,500 shares of \$10.00 par value stock of F. W. Woolworth Company. Denies all other allegations contained in subparagraph VII (iii) of paragraph 5 of the petition.

VII (jjj). Admits that in 1933 the petitioner sold 8,500 shares of \$10.00 par value stock of F. W. Woolworth Company and received therefor the sum of \$332,105.00. Denies all other allegations contained in subparagraph VII (jjj) of paragraph 5 of the petition.

VII (kkk). Admits that in her return for the calendar year 1933 petitioner claimed a capital loss on the sale of 8,500 shares of \$10.00 par value stock of F. W. Woolworth Company in the amount of \$245,895.00. Denies all other allegations contained in subparagraph VII (kkk) of paragraph 5 of the petition.

VII (lll). Admits that the Commissioner has disallowed said capital loss and has determined a capital gain of \$269,771.67 from the sale of stock of the F. W. Woolworth Company in 1933. Admits that the lot of Woolworth stock transferred to petitioner on August 26, 1924, subsequently became 37,200 shares of the par value of \$10.00 per share. Denies all other allegations contained in subparagraph VII (lll) of paragraph 5 of the petition.

Denies generally and specifically each and every allegation contained in the taxpayer's petition not hereinbefore admitted, qualified, or denied.

50 6. In the event it be determined that the Commissioner erred against the petitioner in respect of the securities mentioned in subparagraphs II, III, IV, V, VI, and VII of paragraph 4 of the petition, respondent avers that the Commissioner erred in favor of the petitioner by overstating petitioner's losses in respect of the following securities:

- (a) 184½ shares Niagara Share common stock;
- (b) 100 shares Northern Pacific common stock;
- (c) 125 shares Southern Pacific common stock;
- (d) 320 shares Hotels Statler common stock;
- (e) 37M bonds of Federal Land Bank (St. Paul);
- (f) 20M bonds of Federal Land Bank (Louisville); and
- (g) 10M New York City bonds (corporate stock) (4¼'s—1963).

7. In support of the aforesaid allegations of error, and in further defense of the deficiency determined, respondent relies upon following additional facts:

(a) During the year 1933 the petitioner sold and disposed of the following securities, for sales prices as indicated:

Description	Sales prices
184½ shares Niagara Share common stock.....	\$490.88
100 shares Northern Pacific common stock.....	1,943.00
125 shares Southern Pacific common stock.....	2,306.87
320 shares Hotels Statler common stock.....	2,833.60
37M bonds of Federal Land Bank (St. Paul) (4½'s of 1952)...	32,143.75
20M bonds of Federal Land Bank (Louisville) (4½'s of 1953)...	16,475.00
10M bonds (corporate stock), New York City (4¼'s—1963)....	8,487.50

51 (b) The aforesaid 184½ shares of Niagara Share common stock consisted of 180 shares received by petitioner on or about June 3, 1932 (in the ratio of 1 for 5), in exchange for 900 shares of the same stock, in connection with a reduction in the par value of the corporation's outstanding stock; and 4½ shares of the new stock received by petitioner as a stock dividend on or about July 15, 1932. Of the aforesaid 900 shares of old stock, petitioner acquired 620 shares by purchase on or about January 29, 1931, at a cost of \$4,727.02. The remaining 280 shares were purchased, prior to August 26, 1931, by the trustees of the testamentary trust set up for petitioner's benefit under the will of petitioner's father. The cost thereof to said trustees was \$4,760.00. Said 280 shares were transferred by the trustees to the petitioner upon her attaining the age of 35 years on August 26, 1931.

(c) The aforesaid 100 shares of Northern Pacific common stock were acquired by petitioner pursuant to the provisions of

her father's will. -Sixty shares thereof were owned by petitioner's father on the date of his death and were transferred by the executors to the trustees of said testamentary trust on July 1, 1921, on which date they had a fair market value of \$4,170.00. The remaining 40 shares were purchased by the trustees in 1925 at a cost of \$2,777.00. Said 100 shares were transferred to petitioner by said trustees on August 26, 1931.

(d) The aforesaid 125 shares of Southern Pacific common stock were acquired by petitioner pursuant to the provisions of said will. Said shares were owned by petitioner's father on the date of his death, and were transferred by the executors to said trustees on July 1, 1921, on which date their fair market value was \$9,296.88. They were transferred to petitioner by the trustees on August 26, 1931.

52 (e) The aforesaid 320 shares of Hotels Statler common stock consisted of 160 shares transferred to petitioner by the trustees of said testamentary trust on August 26, 1924, and 160 shares received by petitioner as a stock dividend in 1929. Said stock was owned by petitioner's father on the date of his death, and was transferred from the executors to said testamentary trustees on July 1, 1921, on which date its fair market value was \$12,000.00.

(f) The aforesaid bonds of the Federal Land Bank (St. Paul) were transferred by said testamentary trustees to the petitioner on August 26, 1924. Said bonds were purchased by said testamentary trustees in 1922 at a cost of \$37,462.50.

(g) The aforesaid bonds of Federal Land Bank (Louisville) were transferred to petitioner by said testamentary trustees on August 26, 1924. Said bonds had been theretofore purchased by said testamentary trustees at a cost of \$20,100.00.

(h) The aforesaid bonds (corporate stock) of the City of New York (41¼'s of 1963) were acquired by the petitioner under the provisions of her father's will. They were distributed by the executors and transferred to said trustees on July 1, 1921. On said date they had a fair market value of \$8,612.50, being the mean between low and high quotations of 83¼ and 89, respectively. The Commissioner erroneously determined the value of said bonds on July 1, 1921, to be \$10,537.50, and thereby overstated their value on said date by the sum of \$1,925.00. In the event July 1, 1921, be held to be the proper basic date, respondent hereby makes claim to the increased deficiency resulting from the correction of said error of valuation. The aforesaid bonds
53 were transferred to petitioner by the testamentary trustees on August 26, 1924.

(i) The respective fair market values of said securities on the dates they were transferred to petitioner by the trustees of said testamentary trust, and the respective bases allowed by the Commissioner in determining the deficiency for the year 1933, were as follows:

Description	Values when transferred to petitioner	Basis allowed by Commissioner
280 shares Niagara Share common stock transferred August 26, 1931.....	\$1,735.00	\$4,720.00
100 shares Northern Pacific common stock transferred August 26, 1931.....	3,312.50	6,947.00
125 shares Southern Pacific common stock transferred August 26, 1931.....	9,156.25	9,296.88
160 shares Hotels Statler common stock transferred August 26, 1931.....	9,600.00	12,000.00
37M bonds of Federal Land Bank (St. Paul), 4½'s of 1952, transferred August 26, 1924.....	37,046.25	37,462.50
20M bonds of Federal Land Bank (Louisville), 4½'s of 1953, transferred August 26, 1924.....	20,075.00	20,100.00
10M bonds (corporate stock) New York City 4½'s—1963, transferred August 26, 1924.....	10,100.00	10,537.50

(j) In determining the deficiency the Commissioner allowed a deduction for contributions in the amount of \$3,380.24. In the event it be determined that petitioner's net income for 1933 has been overstated, then the deduction for contributions should be reduced to an amount not exceeding 15% of the net income as redetermined.

8. In further defense of the Commissioner's determination, and in support of an alternative claim to an increased deficiency for the year 1933, respondent relies upon the following additional facts:

(a) With respect to the securities sold by petitioner in the year 1933, which were owned by petitioner's father on the date of his death or derived from securities owned by petitioner's father on the date of his death, such securities were acquired by petitioner by transfer in trust before January 1, 1921; and the bases to petitioner of the securities so acquired were the fair market values thereof on May 16, 1915, as provided in Sec. 113 (a) (4) of the Revenue Act of 1932.

(b) On information and belief, the fair market values of said securities owned by petitioner's father on the date of his death were less than the amounts used as bases by the Commissioner in making his determination, and were less than the respective bases claimed by the petitioner in this proceeding.

(c) With respect to securities sold by petitioner in 1933, which were purchased by the executors or which were derived from securities purchased by the executors, such securities were acquired by petitioner by purchase, and the bases to petitioner of the securities so acquired were the respective costs thereof, viz., the amounts paid by the executors.

55 (d) On information and belief, the respective costs of such securities were less than the bases used by the Commissioner in his determination, and were less than the bases claimed by the petitioner in this proceeding.

Wherefore, it is prayed that the Board redetermine the correct amount of the deficiency involved in this proceeding to be equal to the amount determined by the Commissioner, viz, \$65,549.60 plus any and all additional amounts which may result from the correction of any error made by the Commissioner. The Commissioner hereby makes claim for the increased deficiency resulting from such redetermination.

(Signed) HERMAN OLIPHANT,
Herman Oliphant,

*General Counsel for the Department of the Treasury,
Attorney for Respondent.*

Of Counsel:

F. R. SHEARER,

E. L. UPDIKE,

*Special Attorneys for the
Bureau of Internal Revenue.*

56 Before United States Board of Tax Appeals

Docket No. 84640

[Same title.]

Reply

Filed Sept. 5, 1936

The petitioner, by her attorney, Ralph M. Andrews, in reply to respondent's answer herein, admits and denies the affirmative allegations thereof as follows:

4 IV. Admits as alleged in paragraph "4 IV" of respondent's answer that the Commissioner's final determination overvalued \$10,000 face amount of the corporate stock of the City of New York for water supply purposes, 4 1/4's of 1960, as of July 1, 1921, but denies that said overvaluation is material or that the Commissioner has thereby erred in favor of the petitioner.

5 IV (y). Admits that the \$10,000 face amount of corporate stock of the City of New York, 4 1/4's of 1960 described in paragraph "5 IV (y)" of the respondent's answer was overvalued by the Commissioner as of July 1, 1921. Denies all other allegations in said paragraph contained.

5 IV (hh). Admits that the Commissioner overvalued as of July 1, 1921, the value of \$10,000 face amount of corporate stock of the City of New York, 4¼'s of 1960. Denies each and every other allegation contained in paragraph "5 IV (hh)," of respondent's answer.

57 6. Admits that the Commissioner erred in failing to determine the losses sustained by the petitioner on the sale of the securities described in paragraph "6" of respondent's answer on the basis of the fair market value of said securities on the date they were distributed by petitioner's father's trustees to petitioner. Denies each and every other allegation contained in paragraph "6."

7 (a). Admits the allegations contained in paragraph "7 (a)" of respondent's answer.

7 (b)-7 (g), inclusive. Admits the allegations contained in paragraphs "7 (b)"-"7 (g)," inclusive, of respondent's answer.

7 (h). Admits that the corporate stock of the City of New York, 4¼'s of 1963, described in paragraph "7 (h)" of respondent's answer were acquired by petitioner pursuant to the provisions of her father's will. Admits that said corporate stock was transferred by her father's executors to her father's testamentary trustees of July 1, 1921. Admits that on the latter date said stock was quoted at varying prices from a low of 83¼ to a high of 89. Admits that the Commissioner determined the value of said corporate stock of July 1, 1921, to be \$10,537.50. Admits that said corporate stock was distributed to petitioner by her father's testamentary trustees on August 26, 1924. Denies each and every other allegation contained in said paragraph "7 (h)."

7 (i). Admits the allegations contained in paragraph "7 (i)" of respondent's answer.

7 (j). Admits that in determining the deficiency the Commissioner allowed a deduction for contributions of \$3,380.24. Admits that the deduction to which petitioner is entitled for contribution must be determined in accordance with the provisions of Section 23 (n) of the Revenue Act of 1932. Denies each and every other allegation in said paragraph "7 (j)" contained.

8 (a). Denies the allegations contained in paragraph "8 (a)" of respondent's answer.

8 (b). Denies that the fair market values of all of the securities owned by petitioner's father at the time of his death were less than the amounts used as bases by the Commissioner in making his determination and were less than the respective bases claimed by the petitioner in this proceeding.

8 (c). Denies the allegations contained in paragraph "8 (c)" of respondent's answer.

8 (d). Denies the allegations contained in paragraph "8 (d)" of respondent's answer.

Denies generally and specifically each and every allegation contained in respondent's answer not hereinbefore admitted, qualified, or denied.

Wherefore, petitioner prays that the Board may hear this proceeding and determine that the respondent erred in the respects stated in paragraph "4" of the petition, that the claims for an additional deficiency made in respondent's answer are without merit and should be denied and that petitioner is entitled to the relief prayed for in paragraph "6" of the petition.

(S) RALPH M. ANDREWS,

Counsel for Petitioner,

*Office and Post Office Address, 1330 Marine Trust Bldg.,
239 Main Street, Buffalo, New York.*

59 [Duly sworn to by Dorothy K. G. Rogers; jurat omitted
in printing.]

60 Before United States Board of Tax Appeals

Docket No. 84640

[Same title.]

Amendments of petition

Filed at Hearing, Dec. 14, 1938

The petition in this proceeding is amended in the following respects:

Paragraph 4-III is amended to read as follows:

"The determination by the Commissioner of Internal Revenue that, for the purpose of determining gain or loss, petitioner's cost basis on the sale during the calendar year 1933 of certain shares of the capital stock of The Atchison, Topeka & Santa Fe Railway Company, which petitioner had acquired from her father's testamentary trustees, was as follows:

"i. As to so much thereof as was purchased by her father prior to his death, the fair market value of said securities on the date of their transfer by her father's executors to her father's testamentary trustees.

"ii. As to so much thereof as was purchased by her father's testamentary trustees, the cost thereof to said trustees."

Paragraph 4-IV is amended to read as follows:

61 "The determination by the Commissioner of Internal Revenue that, for the purpose of determining gain or loss, petitioner's cost basis on the sale during the calendar year 1933 of certain shares of the common capital stock of United States Steel Corporation and of certain corporate stock of the City of New York issued for water supply purposes (4¼'s of 1960), which petitioner had acquired from her father's testamentary trustees, and which had been purchased by her father prior to his death, was the fair market value of said securities on the date of the transfer thereof by her father's executors to her father's testamentary trustees."

Paragraph 4-V is amended to read as follows:

"The determination by the Commissioner of Internal Revenue that, for the purpose of determining gain or loss, petitioner's cost basis on the sale during the calendar year 1933 of certain bonds of the City of Philadelphia (4's of 1946) and on the maturity during the calendar year 1933 of certain bonds of the City of Rochester (4½'s of 1933), which petitioner had acquired from her father's testamentary trustees, and which had theretofore been purchased by her father's executors, was the fair market value of said securities on the date of the transfer thereof by her father's executors to her father's testamentary trustees."

Paragraph 4-VII is amended to read as follows:

"The determination by the Commissioner of Internal Revenue that on petitioner's sale during the calendar year 1933 of 8,500 shares of the capital stock of F. W. Woolworth Company, petitioner derived a capital gain of \$269,771.67 instead of sustaining a capital loss of \$256,520.00, upon the grounds (as stated in the deficiency notice):

62 "That 'an analysis of your account with the Woolworth stock shows that through the 2½ for 1 exchange in 1929, the identity of your various holdings in this stock was lost. Therefore, in accordance with article 600 (4) of Regulations 77, the 8,500 shares sold in 1933 have been held to have come from the earliest acquisitions of the stock;' and

"ii. That petitioner's cost basis in the F. W. Woolworth Company stock distributed to her by her father's testamentary trustees, and which had theretofore been purchased by her father prior to his death, is the fair market value of said stock on July 1, 1921, the date of the transfer thereof by her father's executors to her father's testamentary trustees."

Paragraph 5-I-(j) is amended to read as follows:

"(j) The amount distributed by said Great Southern Lumber Company to petitioner, as aforesaid, was less than the fair market value of said stock on August 26, 1924, the date on which said stock was distributed to petitioner by her father's testamen-

tary trustees, and was, less than the fair market value of said stock on July 1, 1921, the date on which said stock was transferred by her father's executors to his testamentary trustees, as adjusted on account of intervening distributions from capital, and petitioner did not include any part of the amount so received in her taxable net income for the year 1933."

Paragraph 5-III-s is amended to read as follows:

63 "(s) Pursuant to the provisions of petitioner's father's will above quoted at paragraph II (1), 20% of said shares of stock of The Atchison, Topeka & Santa Fe Railway Company or 100 shares, was transferred by the executors to the testamentary trustees for petitioner on July 1, 1921. Said stock had a fair market value on that date of \$80.50 per share, or a total value of \$8,050.00."

Paragraph 5-III-(x) is amended to read as follows:

"(x) The Commissioner of Internal Revenue, in his final determination, has determined that the petitioner's loss on said sale was \$3,665.46, being the difference between the fair market value of 100 of said shares on the date they were transferred to the testamentary trustees by the executors, plus the trustees' cost of the 4 shares purchased by them in 1928, and the sale price thereof."

Paragraph 5-IV-(y) is amended to read as follows:

"(y) On July 1, 1921, the executors of petitioner's father's estate transferred to the testamentary trustees for petitioner, pursuant to the provisions of the will above quoted at paragraph II (1), 600 shares of the common capital stock of United States Steel Corporation, which, on that date, had a fair market value of \$74.50 per share, or a total fair market value of \$44,700.00, and \$10,000.00 face amount of the corporate stock of the City of New York issued for water supply purposes (4¼'s of 1960) which the Commissioner has determined had a fair market value on said date of \$10,075.00."

Paragraph 5-IV-(hh) is amended to read as follows:

64 "(hh) The Commissioner of Internal Revenue, in his final determination, has determined that petitioner's capital loss on the sale of said United States Steel Corporation stock was \$45,975.33, and on the sale of said corporate stock of the City of New York was \$2,037.50, upon the ground that the proper basis, for tax purposes, in computing petitioner's gain or loss, was the fair market value on July 1, 1921, of so much of said securities as was acquired by petitioner from her

father's testamentary trustees, and which, was transferred to said trustees by her father's executors on said July 1, 1921."

Paragraph 5-V-(ii) is amended to read as follows:

"(ii) On July 1, 1921, the executors of the estate of petitioner's father transferred to the testamentary trustees for petitioner, pursuant to the provisions of the will above quoted at paragraph II (1), \$50,000.00 face amount of the bonds of the City of Philadelphia, Pennsylvania (4's of 1946) and \$20,000.00 face amount of the bonds of the City of Rochester, New York (4½'s of 1933). Upon information and belief, the Commissioner of Internal Revenue has determined the fair market value of said City of Philadelphia bonds on the date of said transfer to be \$50,687.50, and of said City of Rochester bonds to be \$20,082.50."

Paragraph 5-V-(kk) is amended to read as follows:

"(kk) When petitioner attained the age of 28 years on August 26, 1924, said testamentary trustees distributed said bonds of the City of Rochester to petitioner. On that date said bonds had a fair market value of \$104.87 per \$100.00, or a total value of \$20,974.00."

Paragraph 5-V-(oo) is amended to read as follows:

65 "(oo). The Commissioner of Internal Revenue, in his final determination, has determined that petitioner's loss on the sale of said bonds of the City of Philadelphia was \$8,281.25, and on the maturity of the said bonds of the City of Rochester was \$82.50, being the difference between the fair market value of said securities on the date on which they were transferred by petitioner's father's executors to his testamentary trustees, and the amounts received therefor by petitioner during the calendar year 1933."

Paragraph 5-VI-(pp) is amended to read as follows:

"(pp) On June 15, 1925, the executors of the estate of petitioner's father transferred to the testamentary trustees for petitioner, pursuant to the provision of the will above quoted at paragraph II (1), 214 shares of the common capital stock of Niagara, Lockport & Ontario Power Company, which had theretofore cost said executors \$4,537.06. Said 214 shares had a fair market value on said June 15, 1925, of \$76.00 per share, or an aggregate value of \$16,264.00."

Paragraph 5-VI-(qq) is amended to read as follows:

"(qq) Thereafter and on or about August 1, 1925, said testamentary trustees exchanged said 214 shares of Niagara, Lockport & Ontario Power Company common stock for 267½ shares of the \$25.00 par value preferred stock (sometimes referred to as \$1.60 preferred stock) and 267½ shares of the common stock of

Buffalo, Niagara & Eastern Power Corporation, said exchange being pursuant to a plan of reorganization to which both said Niagara, Lockport & Ontario Power Company and Buffalo, Niagara & Eastern Power Corporation were parties. On
66 the date of said exchange the fair market value of said common stock of Buffalo, Niagara & Eastern Power Corporation was \$42.375 per share and of the preferred stock of said corporation was \$24.375 per share."

Paragraph 5-VII-(fff) is amended to read as follows:

"(fff) On July 1, 1921, petitioner's father's executors transferred to the testamentary trustees for petitioner, in accordance with the terms of the will quoted above, 4,960 shares of the par value of \$100.00 per share of the F. W. Woolworth Company which on that date had a fair market value of \$110.00 per share, or an aggregate fair market value of \$545,600.00. Subsequently and on or about June 30, 1924, said trustees, pursuant to proper corporate action by which reduction in the par value of shares from \$100.00 to \$25.00 was accomplished, exchanged said 4,960 shares of \$100.00 par value of F. W. Woolworth Company stock for 19,840 shares of \$25.00 par value of stock of said company."

Paragraph 6-V is amended to read as follows:

"For the purpose of determining gain or loss on petitioner's sale during the calendar year 1933 of the bonds of the City of Philadelphia, Pennsylvania (4's of 1946), and on the maturity during the calendar year 1933 of the bonds of the City of Rochester, New York (4½'s of 1933), petitioner's cost basis is the fair market value of said bonds on August 26, 1924, the date on which said securities were distributed to petitioner by her father's testamentary trustees."

Paragraph 6-VII is amended to read as follows:

67 "On the sale during the calendar year 1933 of 8,500 shares of \$10 par value stock of F. W. Woolworth Company, petitioner sustained a capital loss of \$256,520.00, that said stock was sold out of the lot of 37,500 shares of \$10 par value acquired by petitioner from her father's testamentary trustees on August 26, 1931, and that petitioner's cost basis in said stock is the fair market value thereof on said August 26, 1931, the date on which it was distributed to her by her father's testamentary trustees.

(S) RALPH M. ANDREWS,

Counsel for Petitioner,

Office and Post-office Address, 1330 Marine Trust Building,

239 Main Street, Buffalo, New York.

68 [Duly sworn to by Dorothy K. G. Rogers; jurat omitted
in printing.]

Docket No. 84640

[Same title.]

Answer to amendments of petition

(Filed at hearing Dec. 14, 1938)

Comes now the Commissioner of Internal Revenue by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the amendments of petition filed in the above-entitled appeal admits, denies, avers, and alleges as follows:

4-III. Admits that the Commissioner of Internal Revenue in his notice of deficiency determined that the petitioner's basis for computing the gain or loss on the sale during 1933 of certain shares of stock of The Atchison, Topeka & Santa Fe Railway Company was as follows: As to the shares owned by petitioner's father on the date of his death the fair market value thereof on the date of their transfer by her father's executors to the trustees of the trust created under Article Twenty-First (B) of petitioner's father's will and as to the shares purchased by the trustees the cost thereof to the trustees. Denies that the Commissioner thereby erred and denies all other allegations contained in subparagraph III of paragraph 4 of the amendments of petition.

4-IV. Admits that the Commissioner in his notice of deficiency determined that petitioner's basis for determining
70 gain or loss on the sale during 1933 of certain shares of common stock of United States Steel Corporation and of certain bonds or corporate stock of the City of New York (4¼'s of 1960) was the fair market values thereof on the date said securities were transferred by her father's executors to the trustees of the aforementioned trust. Denies that the Commissioner thereby erred against the petitioner and avers that the Commissioner erred in favor of the petitioner by overvaluing the aforesaid bonds of the City of New York. Denies all other allegations contained in subparagraph IV of paragraph 4 of the amendments of petition.

4-V. Admits that the Commissioner determined that petitioner's basis for determining gain or loss on the sale during 1933 of certain bonds of the City of Philadelphia (4's of 1946) and on the maturity during 1933 of certain bonds of the City of Rochester (4½'s of 1933) was the fair market values thereof on the date said securities were transferred by petitioner's father's executors to the trustees of the aforementioned trust. Denies

that the Commissioner thereby erred and denies all other allegations contained in subparagraph V of paragraph 4 of the amendments of petition.

4-VII. Admits that the Commissioner in his notice of deficiency determined that petitioner on the sale during the calendar year 1933 of 8,500 shares of the capital stock of F. W. Woolworth Company realized a capital gain of \$269,771.67. Denies that the Commissioner thereby erred and denies all other allegations contained in subparagraph VII of paragraph 4 of the amendments of petition.

5-I-(j). Admits that petitioner did not include any part of the amount so received by her in her taxable income for the year 1933. Denies all other allegations contained in subparagraph

I-(j) of paragraph 5 of amendments of petition.

71 5-III-(s). Admits that petitioner's father's executors on

July 1, 1921, transferred of record and delivered to the trustees of the trust created by Article Twenty-First (B) of petitioner's father's will 100 shares of the capital stock of The Atchison, Topeka & Santa Fe Railway Company. Admits that said stock had a fair market value on that date of \$80.50 per share, or a total value of \$8,050.00. Denies all other allegations contained in subparagraph III-(s) of paragraph 5 of the amendments of petition.

5-III-(x). Admits that the Commissioner in his notice of deficiency determined that petitioner sustained a capital loss on said sale of only \$3,665.46, the same being the difference between the fair market value of the 100 shares on July 1, 1921, plus the cost to the trustees of the four shares later purchased by them and the sale price of \$4,784.54. Denies all other allegations contained in subparagraph III-(x) of paragraph 5 of the amendments of petition.

5-IV-(y). Admits that on July 1, 1921, the executors of petitioner's father's estate transferred of record and delivered to the trustees for petitioner (1) 600 shares of the common capital stock of the United States Steel Corporation which on that date had a fair market value of \$74.50 per share, or a total fair market value of \$44,700.00, and (2) \$10,000.00 face amount of the bonds or corporate stock of the City of New York. Admits that the Commissioner has determined that said bonds had a fair market value on July 1, 1921; of \$10.075.00 but avers that said determination of value was erroneous in that the fair market value of said bonds on said date was substantially less than said amount, to wit, \$8,375.00.

72 Respondent therefore alleges that the Commissioner thereby understated petitioner's capital net gain for the year 1933 by the amount of \$2,000.00. Denies all other allegations

contained in subparagraph IV-(j) of paragraph 5 of the amendments of petition.

5-IV-(hh). Admits that the Commissioner in his notice of deficiency determined the petitioner's capital losses on the aforesaid sales were \$45,975.33 and \$2,037.50, respectively. Admits that said determination was based upon the ground that petitioner's basis for gain or loss in respect to said stock and bonds was their fair market values on July 1, 1921, but avers that the Commissioner overvalued the aforesaid bonds as hereinabove alleged. Denies all other allegations contained in subparagraph IV-(hh) of paragraph 5 of the amendments of petition.

5-V-(ii). Admits that on July 1, 1921, the executors of the estate of petitioner's father transferred and delivered to the trustees for petitioner certain bonds of the City of Philadelphia and certain bonds of the City of Rochester. Admits that the Commissioner determined that the bonds of the City of Philadelphia and the bonds of the City of Rochester on July 1, 1921, had fair market values in the respective amounts of \$50,687.50 and \$20,082.50. Denies all other allegations contained in subparagraph V-(ii) of paragraph 5 of the amendments of petition.

5-V-(kk). Admits that when petitioner attained the age of twenty-eight years on August 26, 1924, the trustees transferred the bonds of the City of Rochester to petitioner. Denies all other allegations contained in subparagraph V-(kk) of paragraph 5 of the amendments of petition.

5-V-(oo). Admits that the Commissioner of Internal Revenue in his notice of deficiency has determined that petitioner's loss on the sale of the City of Philadelphia bonds was \$8,281.25 and on the maturity of the bonds of the City of Rochester was \$82.50, the same being the difference between the fair market values of said securities on July 1, 1921, and the amounts received therefor by petitioner in 1933. Denies all other allegations contained in subparagraph V-(oo) of paragraph 5 of the amendments of petition.

5-VI-(pp). Admits that on or about June 15, 1925, the executors of the estate of petitioner's father transferred to the trustees for petitioner 214 shares of the common capital stock of Niagara, Lockport & Ontario Power Company which had theretofore cost said executors \$4,537.06. Admits that said 214 shares had a fair market value on June 15, 1925, of \$76.00 per share or an aggregate value of \$16,264.00. Denies all other allegations contained in subparagraph VI-(pp) of paragraph 5 of the amendments of petition.

5-VI-(qq). Admits that on August 1, 1925, the trustees exchanged the 214 shares of common stock of Niagara, Lockport

& Ontario Power Company for 267½ shares of the \$1.60 preferred stock and 267½ shares of the common stock of the Buffalo, Niagara & Eastern Power Corporation. Admits that such exchange was in pursuance to a plan of reorganization to which both Niagara, Lockport & Ontario Power Company and Buffalo, Niagara & Eastern Power Corporation were parties. Admits that on the date of such exchange the fair market value of said common stock of Buffalo, Niagara & Eastern Power Corporation was \$42.375 per share and of the preferred stock of said corporation was \$24.375 per share. Denies all other allegations contained in subparagraph VI-(qq) of paragraph 5 of the amendments of petition.

74 5-VII-(fff). Admits that on July 1, 1921, petitioner's father's executors transferred of record and delivered to the trustees for petitioner 4,960 shares of the common stock of F. W. Woolworth Company. Admits that on July 1, 1921, said stock had a fair market value of \$110.00 per share. Denies all other allegations contained in subparagraph VII-(fff) of paragraph 5 of the amendments of petition.

6-V. Denies the allegations contained in subparagraph V of paragraph 6 of the amendments of petition.

6-VII. Denies the allegations contained in subparagraph VII of paragraph 6 of the amendments of petition.

Denies generally and specifically each and every allegation contained in the amendments of petition not hereinbefore specifically admitted, qualified or denied.

Wherefore it is prayed that the Board redetermine the correct amount of the deficiency involved in this proceeding to be equal to the amount determined by the Commissioner, viz, \$65,549.60, plus any and all additional amounts which may result from the correction of any error made by the Commissioner. The Commissioner hereby makes claim for the increased deficiency resulting from such redetermination.

(Signed) J. P. WENCHEL,
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:

W. HERDMAN SCHWATKA,
EDWARD L. UPDIKE,
Special Attorneys,
Bureau of Internal Revenue.

ELU-afh 12-12-38.

Docket No. 84640

[Same title.]

Amended reply

Filed at Hearing, Dec. 14, 1938

The petitioner, by her attorney, Ralph M. Andrews, in reply to respondent's amended answer herein, admits and denies the affirmative allegations thereof as follows:

4 IV. Admits as alleged in paragraph "4 IV" of respondent's amended answer that the Commissioner's final determination overvalued \$10,000.00 face amount of the corporate stock of the City of New York for water supply purposes, $4\frac{1}{4}$'s of 1960, as of July 1, 1921, but denies that said overvaluation is material or that the Commissioner has thereby erred in favor of the petitioner.

5 IV (y). Admits that the \$10,000.00 face amount of corporate stock of the City of New York, $4\frac{1}{4}$'s of 1960, described in paragraph "5 IV (y)" of the respondent's amended answer was overvalued by the Commissioner as of July 1, 1921. Denies all other allegations in said paragraph contained.

5 IV (hh). Admits that the Commissioner overvalued as of July 1, 1921, the value of \$10,000.00 face amount of corporate stock of the city of New York, $4\frac{1}{4}$'s of 1960. Denies each and every other allegation contained in paragraph "5 IV (hh)" of respondent's amended answer.

6. Admits that the Commissioner erred in failing to determine the losses sustained by the petitioner on the sale of the securities described in paragraph "6" of respondent's amended answer on the basis of the fair market value of said securities on the date they were distributed by petitioner's father's trustees to petitioner. Denies each and every other allegation contained in paragraph "6."

7 (a). Admits the allegations contained in paragraph "7 (a)" of respondent's amended answer.

7 (b), 7 (g) inclusive. Admits the allegations contained in paragraphs "7 (b)" - "7 (g)" inclusive of respondent's amended answer.

7 (h). Admits that the corporate stock of the City of New York, $4\frac{1}{4}$'s of 1963, described in paragraph "7 (h)" of respondent's amended answer were acquired by petitioner pursuant to the provisions of her father's will. Admits that said corporate stock

was transferred by her father's executors to her father's testamentary trustees on July 1, 1921. Admits that on the latter date said stock was quoted at varying prices from a low of 83 $\frac{1}{4}$ to a high of 89. Admits that the Commissioner determined the value of said corporate stock of July 1, 1921, to be \$10,537.50. Admits that said corporate stock was distributed to petitioner by her father's testamentary trustees on August 26, 1924. Denies each and every other allegation contained in said paragraph "7 (h)."

7 (i). Admits the allegations contained in paragraph "7 (i)" of respondent's amended answer.

7 (j). Admits that in determining the deficiency the Commissioner allowed a deduction for contributions of \$3,380.24. Admits that the deduction to which petitioner is entitled for contributions must be determined in accordance with the provisions of Section 23 (n) of the Revenue Act of 1932. Denies each and every other allegation in said paragraph "7 (j)" contained.

8. (a) Denies the allegations contained in paragraph "8 (a)" of respondent's amended answer.

8. (b) Denies that the fair market values of all of the securities owned by petitioner's father at the time of his death were less than the amounts used as bases by the Commissioner in making his determination and were less than the respective bases claimed by the petitioner in this proceeding.

8. (c) Denies the allegations contained in paragraph "8 (c)" of respondent's amended answer.

8. (d) Denies the allegations contained in paragraph "8 (d)" of respondent's amended answer.

Denies generally and specifically each and every allegation contained in respondent's amended answer not hereinbefore admitted, qualified, or denied.

Wherefore, petitioner prays that the Board may hear this proceeding and determine that the respondent erred in the respects stated in paragraph "4" of the amended petition, that the claims for an additional deficiency made in respondent's amended answer are without merit and should be denied and that petitioner is entitled to the relief prayed for in paragraph "6" of the amended petition.

(S) RALPH M. ANDREWS,
Counsel for Petitioner,

*Office and Post-office Address, 1330 Marine Trust Building,
239 Main Street, Buffalo, New York.*

Docket No. 84640

[Same title.]

Stipulation of facts

Filed at Hearing Dec. 14, 1938

It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that the following facts shall be taken as true for the purpose of this proceeding and in the determination of the above appeal, provided, however, that this stipulation shall be without prejudice to the right of either party hereto to introduce other and further evidence at the hearing hereof not inconsistent with the facts herein stipulated to be true.

1. Dorothy K. G. Rogers, the petitioner herein, is a resident of Hyde Park, Dutchess County, State of New York, but at all times material in this proceeding was a resident of the County of Erie, State of New York.

I

2. With respect to the error alleged in paragraph 4-I of the petition herein and denied in paragraph 4-I of respondent's answer, it is now stipulated and agreed by the parties hereto, and without prejudice to either of them, that of the total dividends amounting to \$672.00 received by petitioner during the calendar year 1933, from Great Southern Lumber Company, 83.6544% or \$562.16 is taxable to petitioner as determined by the respondent in his deficiency notice (page 2 of Exhibit A of the petition in this proceeding).

II

3. Petitioner was born on August 26, 1896 as Dorothy Knox. On October 23, 1915, she was married to Frank H. Goodyear. Mr. Goodyear died on October 13, 1930. Thereafter and on September 30, 1931, she was married to Edmund P. Rogers.

4. Petitioner's father, Seymour H. Knox, died on May 16, 1915, leaving a last will and testament, a true and correct copy of which is annexed hereto, designated Exhibit "A" and hereby made a part hereof. Said will was probated on June 3, 1915, in the office of the Surrogate of Erie County, New York. On June 3, 1915, letters testamentary of the last will and testament of Seymour H. Knox, deceased, were duly granted to Grace M.

Knox, Henry D. Knox, and Walter P. Cooke, Seymour H. Knox, petitioner's brother, attained the age of twenty-one years on September 1, 1919. On May 24, 1921, said Seymour H. Knox took and filed with the Surrogate of Erie County the oath of office as executor and on December 21, 1922, nunc pro tunc as of May 24, 1921, supplemental letters testamentary of said last will and testament were duly granted to him "jointly with said executors Grace M. Knox, Henry D. Knox, and Walter P. Cooke." Said executors are hereinafter referred to as "the executors."

5. On May 24, 1921, Henry D. Knox, Walter P. Cooke, and Seymour H. Knox (hereinafter referred to as "the trustees") took and filed with the Surrogate of Erie County, New York, their oaths of office as trustees of the trust under "Article Twenty-first (B)" of the will (Exhibit A). On July 1, 1921, the trustees opened their records and books of account and rented a safe deposit vault in the following name: "Walter P. Cooke, Henry D. Knox, Seymour H. Knox, Trustees for Dorothy K. Goodyear."

6. The trustees purchased the following securities on the dates, in the amounts and for the purchase prices set out below:

Date	Quantity	Security	Purchase price
October 11, 1922.....	\$37,000.00 face amount 4¼% bonds of May 1, 1942.	Federal Land Bank (St. Paul).	\$37,462.50
May 3, 1923.....	\$20,000.00 face amount 4½% bonds of January 1, 1953.	Federal Land Bank (Louisville).	20,100.00
June 2, 1924.....	\$25,000.00 face amount 4¼% bonds of June 1, 1950.	County of Westchester.....	25,768.75
June 2, 1924.....	\$25,000.00 face amount 4¼% bonds of June 1, 1950.	County of Westchester.....	25,901.25

7. On August 26, 1924, the petitioner attained her twenty-eighth birthday. On that date the trustees, pursuant to the will, transferred of record and delivered to the petitioner certain securities including the following securities which the trustees had theretofore purchased as stated in paragraph 6 hereof and which on August 26, 1924 had the fair market values set out below:

Quantity	Security	Total value
\$37,000.00 face amount 4¼% bonds of May 1, 1942....	Federal Land Bank (St. Paul).....	\$37,092.50
\$20,000.00 face amount 4½% bonds of January 1, 1953.	Federal Land Bank (Louisville)...	20,100.00

8. The trustees purchased the following securities on the dates, in the amounts and for the purchase prices set out below:

Date	Quantity	Security	Purchase price
December 21, 1925.....	150 shares common stock.....	American Telephone & Telegraph Company, City of New York.	\$21,343.75
January 19, 1926.....	\$16,000.00 face amount $4\frac{1}{4}\%$ bonds of April 15, 1972.		16,180.00
July 30, 1926.....	25 shares common stock.....	American Telephone & Telegraph Company.	2,568.75
July 25, 1928.....	29 shares common stock.....	American Telephone & Telegraph Company.	2,900.00
June 5, 1929.....	34 shares common stock.....	American Telephone & Telegraph Company.	5,673.92
July 18, 1930.....	34 shares common stock.....	American Telephone & Telegraph Company.	3,515.60

9. On August 26, 1931, petitioner attained her thirty-fifth birthday. On that date the trustees of the aforesaid trust, pursuant to the will, transferred of record and delivered to petitioner certain securities including the following securities which the trustees had theretofore purchased as hereinbefore set out and which on August 26, 1931, had the fair market values set out below:

Quantity	Security	Fair market value
\$25,000.00 face amount $4\frac{1}{4}\%$ bonds of June 1, 1950.	County of Westchester.....	\$27,166.52
\$25,000.00 face amount $4\frac{1}{4}\%$ bonds of June 1, 1959.	County of Westchester.....	27,829.60
272 shares common stock.....	American Telephone & Telegraph Company.	46,274.00
\$16,000.00 face amount $4\frac{1}{4}\%$ bonds of April 15, 1972.	City of New York.....	16,840.00

10. During the calendar year 1933 petitioner sold the securities above described on the dates and for the sales prices set out below:

Date	Quantity	Security	Sales price
December 22, 1933.....	\$16,000.00 face amount $4\frac{1}{4}\%$ bonds of April 15, 1972.....	City of New York.....	\$12,900.00
December 26, 1933.....	\$20,000.00 face amount $4\frac{1}{4}\%$ bonds of January 1, 1953.	Federal Land Bank (Louisville.)	16,475.00
December 26, 1933.....	272 shares common stock.....	American Telephone & Telegraph Company.	29,635.57
December 28, 1933.....	\$37,000.00 face amount $4\frac{1}{4}\%$ bonds of May 1, 1942.	Federal Land Bank (St. Paul).	32,143.75
December 28, 1933.....	\$25,000.00 face amount $4\frac{1}{4}\%$ bonds of June 1, 1950.	County of Westchester.....	19,341.48
December 28, 1933.....	\$25,000.00 face amount $4\frac{1}{4}\%$ bonds of June 1, 1959.	County of Westchester.....	17,908.75

11. In her income tax return for the calendar year 1933 petitioner reported as capital losses on the aforesaid sales the amounts set out below:

Quantity	Security	Amount used as basis in return	Amounts claimed as capital losses
\$16,000.00 face amount $4\frac{1}{4}\%$ bonds of April 15, 1972.	City of New York.....	\$16,860.00	\$3,980.00
\$20,000.00 face amount $4\frac{1}{4}\%$ bonds of January 1, 1953.	Federal Land Bank (Louisville)...	20,075.00	3,600.00
84 272 shares common stock.....	American Telephone & Telegraph Company.	46,750.00	17,114.43
\$37,000.00 face amount $4\frac{1}{4}\%$ bonds of May 1, 1942.	Federal Land Bank (St. Paul)....	37,046.25	4,902.50
\$25,000.00 face amount $4\frac{1}{4}\%$ bonds of June 1, 1950.	County of Westchester.....	27,180.00	7,838.82
\$25,000.00 face amount $4\frac{1}{4}\%$ bonds of June 1, 1959.	County of Westchester.....	27,822.50	9,853.75

The amounts used by the petitioner as the bases of the Federal Land Bank bonds were the amounts which petitioner claimed to be the fair market values thereof on August 26, 1924, the date she attained her twenty-eighth birthday. The amounts used as the bases of the other securities were the amounts which petitioner claimed as the fair market values thereof on August 26, 1931, the date she attained her thirty-fifth birthday.

12. The Commissioner of Internal Revenue in his notice of deficiency held that the petitioner sustained capital losses on the sale of said securities as follows:

Quantity	Security	Amount used by Commissioner as the basis	Amount determined and allowed by Commissioner as a capital loss
\$16,000.00 face amount $4\frac{1}{4}\%$ bonds of April 15, 1972.	City of New York.....	\$16,180.00	\$3,280.00
\$20,000.00 face amount $4\frac{1}{4}\%$ bonds of January 1, 1953.	Federal Land Bank (Louisville)...	20,100.00	3,625.00
272 shares common stock.....	American Telephone & Telegraph Company.	34,002.02	8,366.45
\$37,000.00 face amount $4\frac{1}{4}\%$ bonds of May 1, 1942.	Federal Land Bank (St. Paul)....	37,462.50	5,318.75
\$25,000.00 face amount $4\frac{1}{4}\%$ bonds of June 1, 1950.	County of Westchester.....	25,768.75	6,427.27
\$25,000.00 face amount $4\frac{1}{4}\%$ bonds of June 1, 1959.	County of Westchester.....	25,901.25	7,932.50

The amounts used by the Commissioner in his notice of deficiency as the bases of the aforesaid securities were the respective costs thereof to the trustees.

13. On May 16, 1915, the date of the death of petitioner's father, the latter was the owner among other securities of the following stocks which on the date of his death had fair market values as follows:

Quantity	Security	Value
500 shares common stock.....	The Atchison, Topeka & Santa Fe Railway Company..	\$49,625.00
300 shares common stock.....	Northern Pacific Railway Company.....	31,200.00

14. On July 1, 1921, the executors transferred of record and delivered to the trustees of the trust provided for in "Article Twenty-First (B)" of petitioner's father's will 100 of said 500 shares of the common capital stock of The Atchison, Topeka & Santa Fe Railway Company and 60 of said 300 shares of the common capital stock of the Northern Pacific Railway Company. Thereupon the trustees deposited in the safe deposit vault referred to in paragraph 5 hereof the certificates in the names of the trustees, representing said shares. On July 1, 1921, said shares had the following market values:

Quantity	Security	Fair market value
100 shares common stock.....	The Atchison, Topeka & Santa Fe Railway Company..	\$8,050.00
60 shares common stock.....	Northern Pacific Railway Company.....	4,170.00

87 15. Thereafter on March 2, 1925, the trustees purchased 40 additional shares of the common stock of Northern Pacific Railway Company for \$2,777.00.

16. The Atchison, Topeka & Santa Fe Railway Company issued to its common stockholders of record on January 27, 1928, warrants entitling them to obtain one additional share of common stock of that company at \$100.00 per share for each 25 shares then held by them. Accordingly on February 15, 1928 said trustees received a warrant entitling them to obtain 4 additional shares of said common stock. The rights embodied in said warrant were exercised by the trustees on April 16, 1928, and they obtained for \$400.00 in cash 4 additional shares of said common stock of The Atchison, Topeka & Santa Fe Railway Company. At the time said rights were issued the respective values of the stock and rights were as follows:

The stock per share.....	\$189.625
Each right (25 rights being necessary to obtain one new share)....	3.6875

17. Upon petitioner attaining the age of thirty-five years on August 26, 1931, the trustees, pursuant to the will, transferred of record and delivered to her on that date certain securities including the 104 shares of common capital stock of The Atchison, Topeka & Santa Fe Railway Company and the 160 shares of the common capital stock of the Northern Pacific Railway Company obtained as hereinbefore set out. On August 26, 1931, said stocks had the following fair market values:

Quantity	Security	Total value
104 shares common stock.....	The Atchison, Topeka & Santa Fe Railway Company.....	\$17,027.00
100 shares common stock.....	Northern Pacific Railway Company.....	3,312.50

88 18. On November 29, 1933, petitioner sold said 104 shares of The Atchison, Topeka & Santa Fe Railway Company stock for \$4,784.54 and said 100 shares of Northern Pacific Railway Company stock for \$1,943.00.

19. In her income tax return for the calendar year 1933 petitioner claimed as capital losses on the sales of the above mentioned securities the following:

Quantity	Security	Amount claimed as basis	Amount claimed as capital loss
104 shares common stock.....	The Atchison, Topeka & Santa Fe Railway Company.....	\$14,248.00	\$9,463.46
100 shares common stock.....	Northern Pacific Railway Company.....	3,312.50	1,369.50

The amount used as the bases of said stocks are the amounts which petitioner claimed were the fair market values of said stocks on August 26, 1931, her thirty-fifth birthday.

20. In his notice of deficiency the Commissioner of Internal Revenue determined that petitioner's capital losses on the sale of said securities were as follows:

Quantity	Security	Amount used by the Commissioner as the basis	Amount determined and allowed by Commissioner as capital loss
104 shares common stock.....	The Atchison, Topeka & Santa Fe Railway Company.....	\$8,450.00	\$3,605.46
100 shares common stock.....	Northern Pacific Railway Company.....	6,947.00	5,004.00

89 The amount used by the Commissioner as the basis of The Atchison, Topeka & Santa Fe Railway stock was the fair market value on July 1, 1921, of 100 shares of said stock plus the cost to the trustees of the four additional shares purchased on April 16, 1928. The amount used by the Commissioner as the basis of the 100 shares of stock of the Northern Pacific Railway Company was the amount determined by the Commissioner as the fair market value on July 1, 1921, of the sixty shares of said stock plus the cost to the trustees of the 40 additional shares purchased on March 2, 1925.

IV

21. On May 16, 1915, the date of the death of petitioner's father, the latter was the owner among other securities of the following, which on that date had fair market values as set out below:

Quantity	Security	Unit value	Total fair market value
3,000 shares common stock.....	United States Steel Corporation.....	\$52.50	\$157,500.00
\$50,000.00 face amount 4½% bonds of March 1, 1963.....	City of New York.....	105.375	52,687.50
\$50,000.00 face amount 4½% bonds of September 1, 1960.....	City of New York.....	100.75	50,375.00
627 shares common stock.....	Southern Pacific Company.....	87.375	54,784.12

90 22. On July 1, 1921, petitioner's father's executors transferred of record and delivered to the trustees of the trust provided for in "Article Twenty-first (B)" of his will out of the securities mentioned in paragraph 21 the following securities, which on July 1, 1921 had the fair market values set out below:

Quantity	Security	Unit value	Total value
600 shares common stock.....	United States Steel Corporation.....	\$74.50	\$44,700.00
\$10,000.00 face amount 4½% bonds on March 1, 1963.....	City of New York.....	88.75	8,875.00
\$10,000.00 face amount 4½% bonds of September 1, 1960.....	City of New York.....	83.75	8,375.00
125 shares common stock.....	Southern Pacific Company.....	74.375	9,296.88

Thereupon the trustees deposited in the safe deposit vault referred to in paragraph 5 hereof, said bonds and the certificates in the names of the trustees, representing said shares of United States Steel Corporation and Southern Pacific Company.

23. When the petitioner attained the age of twenty-eight years on August 26, 1924, the trustees, pursuant to the will, transferred of record and delivered to her on that date the 600 shares

91 of the common capital stock of the United States Steel Corporation and the \$10,000.00 face amount $4\frac{1}{2}\%$ bonds of March 1, 1963, of the City of New York. On that date the said securities had the fair market values set out below:

Quantity	Security	Unit value	Fair market value
600 shares common stock.....	United States Steel Corporation.	\$109.00	\$65,400.00
\$10,000.00 face $4\frac{1}{2}\%$ bonds of March 1, 1963.....	City of New York.....	106.625	10,662.50

24. On or about June 1, 1927 petitioner received a 40% stock dividend consisting of 240 shares of the common stock of the United States Steel Corporation on the 600 shares of common stock of said corporation which had been received by her as set out in paragraph 23 hereof.

25. Thereafter and on February 27, 1929, petitioner purchased 160 additional shares of the common capital stock of the United States Steel Corporation for \$30,295.00 in cash. Later, on June 7, 1929, petitioner purchased 142 additional shares of said stock for \$19,880.00 in cash.

26. When petitioner attained her thirty-fifth birthday on August 26, 1931, the trustees of the aforementioned trust, pursuant to the will, transferred of record and delivered to her on that date, among other securities, the \$10,000.00 face amount $4\frac{1}{4}\%$ bonds of September 1, 1960 of the City of New York and 125 shares of Southern Pacific Railway Company stock hereinbefore mentioned. On August 26, 1931, said securities had the fair market values set out below:

Quantity	Security	Fair market value
\$10,000.00 face amount $4\frac{1}{4}\%$ bonds of September 1, 1960.	City of New York.....	\$10,487.50
125 shares common stock.....	Southern Pacific Company.....	9,039.06

27. During the calendar year 1933 petitioner sold the securities above described on the dates and for the sales prices hereinafter stated:

Date	Quantity	Security	Sales price
November 29, 1933..	1,142 shares common stock.....	United States Steel Corporation.	\$48,899.67
November 29, 1933..	100 shares common stock.....	Southern Pacific Company.	1,855.50
December 4, 1933..	25 shares common stock.....	Southern Pacific Company.	451.37
December 21, 1933..	\$10,000.00 face amount $4\frac{1}{4}\%$ bonds of September 1, 1960.	City of New York.....	8,037.50
December 23, 1933..	\$10,000.00 face amount $4\frac{1}{2}\%$ bonds of March 1, 1963.	City of New York.....	8,487.50

93 28. In her income tax return for the calendar year 1933 petitioner claimed as capital losses on the above sales the amounts set out below:

Quantity	Security	Amount used as basis	Amount claimed as capital loss
1,142 shares common stock.....	United States Steel Corporation.	\$115,500.00	\$66,600.33
\$10,000.00 face amount 4½% bonds of March 1, 1963.	City of New York.....	10,100.00	1,612.50
\$10,000.00 face amount 4½% bonds of September 1, 1960.	City of New York.....	10,468.75	2,431.25
125 shares common stock.....	Southern Pacific Company.....	9,156.25	6,849.38

The amount claimed as the basis of the 1,142 shares of common stock of the United States Steel Corporation was the aggregate of \$65,325.00 claimed by the petitioner as the value on August 26, 1924, of 600 shares of said stock and the \$50,175.00 expended by her on the purchase, as stated in paragraph 25 hereof, of 302 additional shares of such stock. The amount claimed by

94 the petitioner as the basis of the \$10,000.00 face amount of the 4½% bonds of March 1, 1963, of the City of New York was the amount claimed by the petitioner to be the fair market value thereof on August 26, 1924. The amount used by the petitioner as the basis of the \$10,000.00 face amount 4½% bonds of September 1, 1960, of the City of New York was the amount claimed by the petitioner to be the fair market value thereof on August 26, 1931. The amount claimed by the petitioner as the basis of the 125 shares of common stock of the Southern Pacific Company was the amount claimed by the petitioner to be the fair market value thereof on August 26, 1931.

29. The Commissioner in his notice of deficiency determined that petitioner sustained capital losses on the sale of such securities as follows:

Quantity	Security	Amount used by Commissioner as basis	Amount determined and allowed by Commissioner as capital loss
1,142 shares common stock.....	United States Steel Corporation.	\$94,875.00	\$45,975.33
\$10,000.00 face amount 4½% bonds of March 1, 1963.	City of New York.....	10,537.50	2,050.00
95 \$10,000.00 face amount 4½% bonds of September 1, 1960.	City of New York.....	10,075.00	2,037.50
125 shares common stock.....	Southern Pacific Company.....	9,296.25	6,990.01

The amount used by the Commissioner as the basis of the 1,142 shares of stock of United States Steel Corporation was the aggregate of \$44,700.00 held by him to be the value on July 1, 1921, of 600 shares of said stock and \$50,175.00 expended by petitioner on the purchase, as stated in paragraph 25 hereof, of the 302 additional shares of such stock. The amounts used by the Commissioner as the bases of the \$10,000.00 face amount of the bonds of the City of New York (4½'s of March 1, 1963), of the \$10,000.00 face amount of bonds of the City of New York (4¼'s of September 1, 1960) and of 125 shares of the common stock of the Southern Pacific Company were the amounts held by the Commissioner to be the respective fair market values thereof on July 1, 1921.

V

30. The executors of the will of Seymour H. Knox, deceased, petitioner's father, purchased the following securities on the dates and for the purchase prices hereinafter stated:

Date	Quantity	Security	Purchase price
July 1, 1916.....	\$250,000.00 face amount 4% bonds of July 1, 1946.	City of Philadelphia..	\$253,437.50
March 4, 1918....	\$100,000.00 face amount 4½% bonds of January 15, 1933.	City of Rochester.....	100,412.50

96 31. On July 1, 1921, the executors transferred of record and delivered to the trustees of the trust provided for in "Article Twenty-first (B)" of petitioner's father's will, out of the bonds described in paragraph 30 hereof, the following which on July 1, 1921, had the fair market values set out below:

Quantity	Security	Fair market value
\$50,000.00 face amount 4% bonds of July 1, 1946.....	City of Philadelphia.....	\$50,687.50
\$50,000.00 face amount 4½% bonds of January 15, 1933....	City of Rochester.....	20,082.50

Thereupon the trustees deposited said bonds in the safe deposit vault referred to in paragraph 5 hereof.

32. When petitioner attained the age of twenty-eight years on August 26, 1924, the bonds described in paragraph 31 hereof, pursuant to the will, were on that date transferred of record and de-

livered by the trustees to the petitioner. On August 26, 1924, said bonds had the following fair market values:

Quantity	Security	Fair market value
\$50,000.00 face amount 4% bonds of July 1, 1946.....	City of Philadelphia.....	\$48,502.22
\$20,000.00 face amount 4½% bonds of January 15, 1933.....	City of Rochester.....	20,714.33

33. On November 24, 1933 petitioner sold said bonds of the face amount of \$50,000 of the City of Philadelphia (4's of July 1, 1946) for \$42,406.25.

34. On January 15, 1933, said bonds of the face amount of \$20,000 of the City of Rochester (4½'s of January 15, 1933) matured and become payable and on June 14, 1933, petitioner received on the redemption of said bonds of the City of Rochester the sum of \$20,000.

35. In her income tax return for the calender year 1933 petitioner claimed as capital losses on the above bonds the following:

Quantity	Security	Amount claimed as basis	Amount claimed as capital loss
\$50,000.00 face amount 4% bonds of July 1, 1946.....	City of Philadelphia.....	\$51,480.00	\$9,073.75
\$20,000.00 face amount 4½% bonds of January 15, 1933.....	City of Rochester.....	20,974.00	974.00

98 The amounts claimed by the petitioner as the bases of said bonds were the amounts which she claimed as the fair market values thereof on the date she attained her twenty-eighth birthday.

36. The Commissioner of Internal Revenue in his notice of deficiency determined that petitioner sustained capital losses with respect to said bonds as follows:

Quantity	Security	Amount used by Commissioner as the basis	Amount determined and allowed by Commissioner as capital loss
\$50,000.00 face amount 4% bonds of July 1, 1946.....	City of Philadelphia.....	\$50,087.50	\$8,281.25
\$20,000.00 face amount 4½% bonds of January 15, 1933.....	City of Rochester.....	20,082.50	82.50

The amounts used by the Commissioner as the bases of said bonds were the fair market values thereof on July 1, 1921.

VI

37. Some time prior to June 15, 1925, the executors of the will of petitioner's father purchased 1,068 shares of the common stock of Niagara, Lockport & Ontario Power Company at a cost of \$22,642.88. On June 15, 1925, the executors transferred of record and delivered 214 of said shares of common stock of the Niagara, Lockport & Ontario Power Company to the trustees of the trust provided for in "Article Twenty-first (B)" of the petitioner's father's will. Thereupon the trustees deposited in the safe deposit vault referred to in paragraph 5 hereof, the certificates in the names of the trustees, representing said shares. Said 214 shares of the Niagara, Lockport & Ontario Power Company stock had a fair market value on June 15, 1925, of \$76.00 per share or an aggregate value of \$16,264.00.

38. On August 1, 1925, the trustees exchanged the 214 shares of common stock of Niagara, Lockport & Ontario Power Company for 267½ shares of the \$1.60 preferred stock and 267½ shares of the common stock without par value of Buffalo, Niagara & Eastern Power Corporation. Said exchange was non-taxable under Section 203 (b) (2) of the Revenue Act of 1924 and Section 112 (b) (3) of the Revenue Act of 1932. On the date of said exchange the fair market value of the common stock of Buffalo, Niagara & Eastern Power Corporation was \$42.375 per share and the fair market value of the \$1.60 preferred stock of said corporation was \$24.375 per share.

39. On August 28, 1925, the trustees purchased 32½ additional shares of the common stock of Buffalo, Niagara & Eastern Power Corporation for \$1,202.50 cash. On the same date the trustees purchased 32½ additional shares of the \$1.60 preferred stock of the par value of \$25.00 per share of Buffalo, Niagara & Eastern Power Corporation for \$780.25 cash. On January 3, 1928, the trustees purchased 75 shares of the Class A stock of Buffalo, Niagara & Eastern Power Corporation for \$1,500.00 cash.

40. On August 19, 1929, the trustees exchanged said 300 shares of the common stock of Buffalo, Niagara & Eastern Power Corporation for 1,200 shares of the common capital stock of Niagara Hudson Power Corporation and 300 Niagara Hudson Power Corporation option warrants. On the same date the trustees exchanged the 75 shares of Class A stock of Buffalo, Niagara & Eastern Power Corporation for 300 shares of the common capital stock and 75 option warrants of the Niagara Hudson Power Corporation. Said exchanges were non-taxable transactions under Sections 112 (b) (5) of the Revenue Acts of 1928 and 1932.

41. On August 19, 1929, the fair market values of the common stock and Class A option warrants of Niagara Hudson Power Corporation were \$26.75 per share and \$9.00 per warrant, respectively.

42. Upon petitioner attaining the age of thirty-five years on August 26, 1931, the trustees pursuant to the will, transferred of record and delivered to petitioner on that date the 267½ shares and 32½ shares of \$1.60 preferred stock of Buffalo, Niagara & Eastern Power Corporation received by the trustees as stated in paragraphs 38 and 39 hereof, and the 1,500 shares of the common capital stock and 375 option warrants of Niagara Hudson Power Corporation received by the trustees as stated in paragraph 40 hereof.

43. On August 26, 1931, said securities had the fair market values set out below:

Quantity	Security	Unit Value	Total Value
360 shares \$1.60 preferred stock.....	Buffalo, Niagara & Eastern Power Corporation.	\$26.875	\$9,662.50
1,500 shares common stock.....	Niagara Hudson Power Corporation.....	10.4375	15,656.25
375 Class A option warrants.....	Niagara Hudson Power Corporation.....	1.8125	679.69

44. On August 8, 1932, pursuant to corporate action taken by the corporation to reduce its capital stock from 45,000,000 shares of the par value of \$10.00 each to 15,000,000 shares of the par value of \$15.00 each, petitioner exchanged her 1,500 shares of old common stock of Niagara Hudson Power Corporation having a par value of \$10.00 each for 500 shares of the new common stock of a par value of \$15.00 each of said corporation, reducing her holdings of said common stock to 500 shares. At the same time petitioner exchanged her 375 option warrants of Niagara Hudson Power Corporation for 125 option warrants of said corporation. Said exchanges were non-taxable under the provisions of Section 112 (b) (3) of the Revenue Act of 1932.

45. On December 21, 1933, petitioner sold said 500 shares of the common stock of Niagara Hudson Power Corporation for \$2,394.50, said 125 option warrants of said corporation for \$39.97 and said 300 shares of the \$1.60 preferred stock of Buffalo, Niagara & Eastern Power Corporation for \$4,750.50.

46. In her income tax return for the calendar year 1933 petitioner claimed as capital losses on account of the sales of said securities the amounts set out below:

Quantity	Security	Amount claimed as basis	Amount claimed as capital loss
500 shares common stock.....	Niagara Hudson Power Corporation.....	\$15,572.50	\$13,178.00
125 option warrants.....	Niagara Hudson Power Corporation.....	656.25	616.25
300 shares \$1.60 preferred stock.....	Buffalo, Niagara & Eastern Power Corporation.	8,100.00	3,340.50

The amounts claimed in the return as the bases of the 500 shares common stock and 125 option warrants of Niagara Hudson Power Corporation were the amounts claimed by petitioner to be the fair market values respectively on August 26, 1931 of the 1,500 shares of the common stock of the par value of \$10.00 and of the 375 option warrants of said Niagara Hudson Power Corporation from which said securities were derived. The amount claimed as the basis of the 300-shares preferred stock of Buffalo, Niagara & Eastern Power Corporation was the amount claimed by petitioner to be the fair market value thereof on August 26, 1931.

47. The Commissioner of Internal Revenue in his notice of deficiency determined that the petitioner sustained a capital loss of \$3,148.30 on the sale of the 500 shares of common stock 103, and 125 option warrants of Niagara Hudson Power Corporation. In determining said amount the Commissioner held that the basis to petitioner of said securities was \$5,582.77, computed as follows:

(1) That part of the cost to the executors of 214 shares of Niagara, Lockport & Ontario Power Company common stock which is allocable to 267½ shares of common stock of Buffalo, Niagara & Eastern Power Corporation (63.4831% of \$4,537.06).....	\$2,880.27
(2) Cost to the trustees of the 32½ additional shares of the common stock of Buffalo, Niagara & Eastern Power Corporation.....	1,202.50
(3) Cost to the trustees of the 75 shares of Class A stock of Buffalo, Niagara & Eastern Power Corporation.....	1,500.00
Total.....	\$5,582.77

In his notice of deficiency the Commissioner determined that petitioner realized a capital gain of \$2,313.46 on the sale of the 300 shares of \$1.60 preferred stock of Buffalo, Niagara & Eastern Power Corporation. In determining said amount Commissioner used as the basis of said stock \$2,437.04 computed as follows:

(1) That part of the cost to the executors of the 214 shares of Niagara, Lockport & Ontario Power Company common stock which is allocable to 267½ shares of the \$1.60 preferred stock of Buffalo, Niagara & Eastern Power Corporation (36.5169% of \$4,537.06).....	\$1,656.79
104 (2) Cost to the trustees of the 32½ additional shares of the \$1.60 preferred stock of Buffalo, Niagara & Eastern Power Corporation.....	780.25
Total.....	\$2,437.04

VII

48. Upon the death of petitioner's father on May 16, 1915, he was the owner among other securities of 19,080 shares of the common stock of a par value of \$100.00 per share of the F. W. Woolworth Company. On May 16, 1915, the fair market value of said stock was \$101.125 per share.

49. On June 1, 1920, petitioner's father's executors received an additional 5,724 shares of said stock as a stock dividend on the 19,080 shares bringing their total holdings of said stock to 24,804 shares.

50. On July 1, 1921, the executors transferred of record and delivered 4,960 of the 24,804 shares of the common stock of F. W. Woolworth Company to the trustees of the trust provided for in "Article Twenty-first (B)" of petitioner's father's will. Thereupon the trustees deposited in the safe deposit vault referred to in paragraph 5 hereof, the certificates in the names of the trustees, representing said shares. On July 1, 1921 the fair market value of said stock was \$110.00 per share or an aggregate fair market value of \$545,600.00.

51. On or about May 21, 1924, the F. W. Woolworth Company increased the number of its authorized shares of common stock from 1,000,000 to 4,000,000 and reduced the par value of each share from \$100.00 to \$25.00. In connection therewith the
105 trustees during the month of June 1924 exchanged their holdings of 4,960 shares of the \$100.00 par value common stock of F. W. Woolworth Company for 19,840 shares of the new \$25.00 par value common stock of the company. Said exchange was nontaxable under Sections 203 (b) (1) and (2) of the Revenue Act of 1924 and Sections 112 (b) (2) and (3) of the Revenue Act of 1932.

52. When petitioner attained the age of twenty-eight years on August 26, 1924, the trustees, pursuant to the will, transferred of record and delivered to petitioner on that date 9,920 shares of said common stock of the F. W. Woolworth Company. On August 26, 1924, said 9,920 shares of common stock of F. W. Woolworth Company had a fair market value of \$111.50 per share or a total value of \$1,106,080.00.

53. On January 29, 1925, petitioner purchased 80 additional shares of the \$25.00 par value common stock of F. W. Woolworth Company for \$9,086.00 in cash. Subsequently on November 12, 1926, she purchased 650 additional shares of said \$25.00 par value stock for \$115,717.87 in cash.

54. On or about December 8, 1926, the F. W. Woolworth Company declared to its common stockholders of record on January 10, 1927, a 50% dividend payable February 1, 1927, in common stock of the company. Accordingly on February 1, 1927, the petitioner received on her then holdings of 10,650 shares of capital stock of said corporation an additional 5,325 shares.

55. On January 27, 1927, petitioner purchased 25 additional shares of the common stock of a par value of \$25.00 of F. W. Woolworth Company, paying therefor \$2,968.75 in cash.

106 56. On May 15, 1929, the F. W. Woolworth Company increased its authorized capital stock from \$100,000,000.00, consisting of 4,000,000 shares of a par value of \$25.00 per share to \$200,000,000.00 consisting of 20,000,000 shares of a par value of \$10.00 per share. At the same time the company offered to issue to its stockholders shares of the new \$10.00 par value stock in exchange for the \$25.00 par value stock then outstanding at the rate of $2\frac{1}{2}$ shares of the \$10.00 par value stock for each share of the \$25.00 par value stock held by them.

57. Thereupon, petitioner exchanged her then holdings of 16,000 shares of the \$25.00 par value common stock of F. W. Woolworth Company received by her as stated in paragraphs 52 to 55, inclusive, hereof, for 40,000 shares of the \$10.00 par value common capital stock of that company. Identification of said 40,000 shares as being derived from particular acquisitions at certain times and with certain bases or prices was lost on said exchange. Said exchange was nontaxable under Sections 112(b) (2) and (3) of the Revenue Acts of 1928 and 1932.

58. After the delivery to petitioner on August 26, 1924, by the trustees of 9,920 shares of the \$25.00 par value stock of the F. W. Woolworth Company, as stated in paragraph 52 hereof, there remained in the hands of said trustees 9,920 shares of the stock of said company.

59. On January 29, 1925, the trustees purchased for \$9,060.00 in cash 80 additional shares of the stock of a par value of \$25.00 each of the F. W. Woolworth Company.

60. On December 21, 1925, the trustees sold at a profit 400 shares out of the lot of 9,920 shares remaining in their 107 hands on August 26, 1924. On the same date the trustees purchased 400 additional shares of said common stock, of F. W. Woolworth Company at a cost of \$83,420.00.

61. As a result of the 50% common stock dividend described in paragraph 54 hereof the trustees on February 1, 1927, received on their then holdings of 10,000 shares of the \$25.00 par value common stock of F. W. Woolworth Company 5,000 additional shares of said stock, bringing their total holdings of said stock to 15,000 shares.

62. Subsequently and on or about June 18, 1929, as a result of the corporate action of F. W. Woolworth Company on May 15, 1929, in reducing the par value of its common stock from \$25.00 to \$10.00 and increasing its capital as stated in paragraph 56 hereof, the trustees exchanged their holdings of 15,000 shares of the \$25.00 par value stock of the company for 37,500 shares of the \$10.00 par value stock of said company. Said exchange was nontaxable under Sections 112 (b) (2) and (3) of the Revenue Acts of 1928

and 1932. Identification of said 37,500 shares of the par value of \$10.00 each as being derived from particular acquisitions was lost in said exchange.

63. When petitioner attained her thirty-fifth birthday on August 26, 1931, the trustees, pursuant to the will, transferred of record and delivered to petitioner on that date the 37,500 shares of the common capital stock of F. W. Woolworth Company then held by them. Said shares had a fair market value on August 26, 1931, of \$69.25 per share or a total value of \$2,596,875.00.

64. On the following dates petitioner sold 8,500 shares out of the lot of 37,500 shares of the common stock of \$10.00 par value of F. W. Woolworth Company received by her from the trustees as hereinbefore stated for the sales prices set out below:

Date of sale	Number of shares sold	Net sales price
December 20, 1933.....	2,000	\$77,610.00
December 21, 1933.....	2,000	77,685.00
December 22, 1933.....	3,500	137,855.00
December 27, 1933.....	1,000	38,955.00
Total.....	8,500	\$332,105.00

65. In her income tax return for the calendar year 1933 petitioner claimed as capital losses \$245,895.00 on the sales referred to in the preceding paragraph. In computing said amounts petitioner used as the basis of said shares \$578,000.00 said sum being the amount which petitioner claimed was the fair market value on August 26, 1931, of 8,500 of the 37,500 shares received from the trustees on that date.

66. In his notice of deficiency the Commissioner of Internal Revenue held:

"An analysis of your account with the Woolworth stock shows that through the 2½ for 1 exchange in 1929, the identity of your various holdings in this stock was lost. Therefore, in accordance with article 600 (4) of Regulations 77, the 8,500 shares sold in 1933 have been held to have come from the earliest acquisitions of the stock. This adjustment, which comprises the greater portion of the increase of \$565,166.99, is as follows:

100	8,500 shares value at August 26, 1931 used by you.....	\$578,000.00
	Value at July 1, 1921, of 566% shares at 100 ¹ (represented by the 8,500 shares sold).....	62,333.33
	Cost overstated.....	\$515,666.67."

¹ Typographical error. This figure should be 110.

VIII

67. Upon the death of petitioner's father on May 16, 1915, he was the owner among other securities of 500 shares of the common capital stock of Hotels Statler Company, Inc., which on the date of death had a fair market value of \$20.00 per share.

68. On April 16, 1921, Hotels Statler Company, Inc., declared a 60% dividend payable on April 18, 1921, to its common stockholders of record April 14, 1921, in common stock of the company. The executors of the will of petitioner's father being the holders of said 500 shares of common stock on April 14, 1921, received thereon on or about April 18, 1921, 300 additional shares of said common stock.

69. On July 1, 1921, the executors of the will of petitioner's father transferred of record and delivered to the trustees of the trust provided for in "Article Twenty-first (B)," of the will 160 shares of said 800 shares of Hotel Statler Company, Inc., common stock. Thereupon the trustees deposited in the safe deposit vault referred to in paragraph 5 hereof, the certificates in the names of the trustees, representing said shares. On July 1, 1921, these 160 shares of stock had a fair market value of \$75.00 per share or a total of \$12,000.00.

70. When the petitioner attained the age of twenty-eight years on August 26, 1924, the trustees, pursuant to the will, transferred of record and delivered to her on that date said 160 shares of common stock of Hotels Statler Company, Inc. On August 26, 1924, said shares had a fair market value of \$100.00 per share or a total of \$16,000.00.

71. On December 20, 1929, Hotels Statler Company, Inc., declared a 100% dividend payable December 23, 1929, to its stockholders of record on December 20, 1929, in common stock of that company. Accordingly the petitioner being the owner of said 160 shares of common stock on December 20, 1929, received on or about December 23, 1929, thereon 160 additional shares of said common stock.

72. On December 21, 1933, petitioner sold her holdings of said 320 shares of the common capital stock of Hotels Statler Company, Inc., for \$2,833.60.

73. In her income tax return for the calendar year 1933 petitioner claimed as a capital loss on said sale the sum of \$6,766.40. Said amount was computed by petitioner upon a basis of \$9,600.00, the amount claimed by petitioner in her income tax return to be the fair market value on August 26, 1924, of the 160 shares of the stock of Hotels Statler Company, Inc., which were delivered to her on that date by the trustees.

74. The Commissioner of Internal Revenue in his notice of deficiency determined that petitioner sustained a capital
111 loss of \$9,166.40 on the sale of said shares. Said amount was computed by the Commissioner upon a basis of \$12,000.00, the amount determined by the Commissioner to be the fair market value on July 1, 1921, of 160 shares of said stock.

IX

75. On September 1, 1927, the trustees of the trust provided for in "Article Twenty-first (B)" of the petitioner's father's will purchased for \$1,600.00 in cash 80 shares of the common capital stock of Marine Share Corporation, a New York corporation with its principal office and place of business in Buffalo, New York.

76. On July 20, 1928, said Marine Share Corporation issued to the holders of its common stock of record on July 20, 1928, rights entitling said stockholders to obtain on or before August 31, 1928, at \$30.00 per share one new share of the common stock of said corporation for each four shares held. Accordingly, immediately after July 20, 1928, said trustees received in respect of their holdings of 80 shares of the capital stock of the Marine Share Corporation a subscription warrant entitling them to obtain 20 additional shares of said common stock. On July 20, 1928, the date on which said rights were issued, Marine Share Corporation stock (ex-rights) had a fair market value of \$50.75 per share or 90.625% of the total value of the shares and rights and the rights had a fair market value of \$5.25 per right (four rights being necessary to obtain one new share) or 9.375% of the total value of the shares and rights.

77. On August 30, 1928, the trustees of said trust exercised all of the rights received with respect to said 80 shares of the
112 capital stock of Marine Share Corporation and obtained 20 additional shares of the common stock of said corporation, paying therefor \$600.00 in cash. On August 30, 1928, the date on which said rights were exercised, Marine Share Corporation stock (ex-rights) had a fair market value of \$53.50 per share or 90.105% of the total value of the shares and rights and the rights had a fair market value of \$5.875 per right or 9.895% of the total value of the shares and rights.

78. Thereafter and on or about March 1, 1929, the trustees exchanged said 100 shares of the capital stock of Marine Share Corporation for 200 shares of the capital stock of Marine Union Investors, Inc. Said exchange was non-taxable under Section 112 (b) (3) of the Revenue Acts of 1928 and 1932.

79. On February 28, 1929, said trustees purchased 80 additional shares of the common capital stock of Marine Union Investors, Inc., paying therefor \$32.00 per share or an aggregate purchase price of \$2,560.00.

80. On June 27, 1930, pursuant to a plan and agreement which became effective on that date, the trustees exchanged the aforesaid 280 shares of the capital stock of Marine Union Investors, Inc., for 280 shares of the common stock of Niagara Share Corporation of Maryland and a stock purchase warrant entitling them at any time on or before March 1, 1933, to subscribe for 28 shares of the common stock of said corporation at \$32.00 per share. Said exchange was non-taxable under the provisions of Sections 112 (b) (3) of the Revenue Acts of 1928 and 1932.

81. On June 27, 1930, the 280 shares of common stock of Niagara Share Corporation of Maryland had a fair market value of \$14.00 per share and the 28 rights to subscribe to the common stock of said corporation had a fair market value of \$4.00 each.

82. When petitioner attained her thirty-fifth birthday on August 26, 1931, the trustees, pursuant to the will, transferred of record and delivered to petitioner on that date the aforesaid 280 shares of common stock and the stock purchase warrant mentioned in paragraph 80 hereof. On August 26, 1931, the aggregate fair market values of said stock and rights were \$1,820.00 and \$12.25, respectively.

83. On January 28, 1931, petitioner purchased individually 620 shares of the common capital stock of Niagara Share Corporation of Maryland and a stock purchase warrant entitling her at any time on or before March 1, 1933, to subscribe for 30 shares of the common stock of said corporation at \$30.00 per share, paying for said shares \$4,725.02 and for said warrant \$26.25.

84. On or about May 14, 1932, the Niagara Share Corporation of Maryland was recapitalized and its capital stock reduced by the issuance of one share of Class B common stock in exchange for each five shares of the common stock theretofore issued and outstanding.

85. The petitioner thereafter received certificates for 124 shares of the Class B common stock of the Niagara Share Corporation of Maryland in exchange for and in cancellation of the certificates representing the 620 shares of the common stock of said corporation purchased by her as stated in paragraph 83 hereof, and certificates for 56 shares of the Class B common stock of Niagara Share Corporation of Maryland in exchange for and in cancellation of the certificates representing the

280 shares of the common stock of said corporation received by her as stated in paragraph 82 hereof, and stock purchase warrants held by the petitioner entitling her to subscribe on or before March 1, 1933, for 58 shares of the common stock of Niagara Share Corporation of Maryland at \$32.00 per share were changed into and became warrants entitling her to subscribe on or before March 1, 1933, for $11\frac{3}{5}$ shares of Class B common stock of Niagara Share Corporation of Maryland at \$160.00 per share. Said exchange was non-taxable under the provisions of sections 112 (b) (2) and (3) of the Revenue Act of 1932.

86. On or about July 15, 1932, petitioner received a certificate representing $4\frac{1}{2}$ shares of the Class B common stock of Niagara Share Corporation as a stock dividend on the aforesaid 180 shares of the Class B common stock of that corporation. Of said $4\frac{1}{2}$ shares, $3\frac{3}{40}$ shares were with respect to the lot of 124 shares and $1\frac{1}{40}$ shares were with respect to the lot of 56 shares referred to in paragraph 85 hereof.

87. Until March 1, 1933, petitioner continued to own said warrants of Niagara Share Corporation of Maryland as aforesaid which on said date entitled her to subscribe for $11\frac{3}{5}$ shares of the Class B common stock of the Niagara Share Corporation of Maryland at \$160.00 per share. On March 1, 1933, the said warrants and the rights represented thereby expired by their terms without having been exercised, sold, or otherwise disposed of.

88. On December 22, 1933, petitioner sold for \$490.88 the 184 full shares of Class B common stock of Niagara Share Corporation of Maryland received by her as stated in paragraphs 85 and 86 hereof.

89. In her income tax return for the calendar year 1933 petitioner reported the sale of said 184 full shares and also erroneously reported the sale of the one-half of a full share and claimed a capital loss thereon and an ordinary loss on the expiration of the warrants as follows:

Quantity	Security	Amount claimed as basis	Amount claimed as loss
184 $\frac{1}{2}$ shares Class B common stock	Niagara Share Corporation of Maryland.	\$6,510.02	\$6,019.14
Warrants (entitling purchase of $11\frac{3}{5}$ shares at \$160.00 per share).	Niagara Share Corporation of Maryland.	124.25	\$ 124.25

¹ Capital loss.

² Ordinary loss.

The amount of \$6,510.02 claimed as the basis of the 184 $\frac{1}{2}$ shares of Class B common stock of Niagara Share Corporation of Maryland was the \$4,725.02 cost to petitioner of the 620 shares of the common stock of Niagara Share Corporation of Maryland plus

\$1,785.00 claimed by petitioner to be the fair market value on August 26, 1931, of the 280 of said shares received by her on that date from the trustees. The amount of \$124.25 claimed as the basis of the warrants or rights was the \$26.25 cost to petitioner of the warrants in respect of 30 shares plus \$98.00 claimed by the petitioner to be the fair market value on August 26, 1931, of the warrant in respect of 28 shares received by her on that date from the trustees.

90. In his notice of deficiency the Commissioner determined that the petitioner sustained a capital loss of \$8,994.14 on the sale of the Niagara Share Corporation stock using as the basis of such stock \$9,485.02, the same representing the cost to the petitioner of \$4,725.02 for the 620 shares purchased by her, plus \$4,760.00 the cost to the trustees of 280 shares delivered to petitioner on August 26, 1931. In said notice of deficiency the Commissioner disallowed all of the loss claimed by the petitioner on the warrant in respect of 28 shares received by the petitioner from the trustees on August 26, 1931, and allowed an ordinary loss of \$26.25 on the warrant in respect of 30 shares purchased by petitioner on January 28, 1931.

X

91. The petitioner during the calendar year 1933 made contributions to organizations of the kind specified in Section 23 (d) of the Revenue Act of 1932 in the amount of \$3,380.00. In the notice of deficiency the Commissioner allowed said \$3,380.00 as a deduction.

92. The executors of the last will and testament of petitioner's father, Seymour H. Knox, deceased, and the trustees of the trust created under "Article Twenty-first (B)" of petitioner's father's will, complied with the provisions of said will and the requirements of the laws of the State of New York with respect to distributions of income, including accumulated income.

93. The executors, the trustees and the petitioner at all times kept their respective books of account and filed their respective tax returns on a cash receipts and disbursements basis.

RALPH M. ANDREWS,
Counsel for Petitioner.

(Signed) J. P. WENCHEL,
Y.

J. P. Wencel,
Chief Counsel,
Bureau of Internal Revenue.

LAST WILL AND TESTAMENT OF SEYMOUR H. KNOX**DATED MAY 12TH, 1915****LAST WILL AND TESTAMENT OF SEYMOUR H. KNOX**

I, Seymour H. Knox, of the City of Buffalo, County of Erie, and State of New York, being of sound mind and memory, do hereby make, publish, and declare this my last Will and Testament, in manner following, that is to say:

ARTICLE FIRST. I direct my executors, hereinafter named, to pay all my lawful debts and funeral expenses. I direct my executors, hereinafter named, to pay from the funds in my estate any transfer tax or taxes, or any collateral inheritance, succession, or legacy tax or taxes imposed by law at the time of my death, upon any and all property, or interest therein, passing under and by virtue of the terms of this my last Will and Testament, and I will and direct that all gifts, bequests, and devises herein mentioned shall be paid at the net amount herein stated without any deduction on account of any such tax or taxes.

119 ARTICLE SECOND. I hereby authorize and direct my executors, hereinafter named, to cause to be erected in Forest Lawn Cemetery, in the City of Buffalo, N. Y., a suitable monument or mausoleum at an expense of not exceeding Fifty thousand dollars (\$50,000) therefor, to be paid from the funds of my estate.

ARTICLE THIRD. I give and devise unto my wife, Grace M. Knox, the house, stable, land, and premises and their appurtenances, situate on the easterly side of Delaware Avenue between Utica and Ferry Streets in the City of Buffalo, and now occupied by my wife and myself as a residence; to have and to hold the same unto my said wife, Grace M. Knox, and to her heirs and assigns forever.

I also give and bequeath unto my said wife, Grace M. Knox, all the pictures, furniture, rugs, books, ornaments, tableware, plate, silver, linen, and all other household furniture and equipment, all jewelry and clothing, and also all horses, carriages, automobiles, and stable and automobile equipment owned by me at the time of my death (excepting only trotting-bred horses, sulkies, harnesses and other equipment hereinafter mentioned and referred to in Article Eighth hereof).

ARTICLE FOURTH. I also give and bequeath unto my wife, Grace M. Knox, the sum of Two hundred fifty thousand dollars (\$250,000) and I will and direct that said legacy be paid to my said wife in securities owned by me at the time of my death to be selected by her and taken by her at their appraised value.

ARTICLE FIFTH. I give and bequeath to my brother, Burtis L. Knox, now residing at Chaffee, Erie County, N. Y., fifty
12C (50) shares of the common capital stock of F. W. Woolworth Company, a corporation organized under the laws of the State of New York; and in addition thereto, I give and bequeath to my said brother, Burtis L. Knox, an annuity of Twelve hundred (\$1,200) and direct my executors hereinafter named to pay over said annuity to my said brother in quarterly payments of Three hundred dollars (\$300) each during his natural life. I direct my said executors to set aside the sum of Thirty thousand dollars (\$30,000) for the purpose of producing said annuity and at the death of my said brother, I give, devise, and bequeath the property so set aside to produce said annuity unto my son, Seymour H. Knox, if he be then living; if not, to my daughters, Dorothy Knox and Marjorie Knox, to be divided between them, share and share alike.

Notwithstanding the foregoing provisions, I further will and direct that if on the 1st day of January, in the year Nineteen hundred and thirty-three, my said brother, Burtis L. Knox, shall be then living, that the annual payments to him shall then cease, and in that event I give, devise, and bequeath to said Burtis L. Knox, all of the property and estate then held to produce such income for his benefit, pursuant to the provisions of this Article Fifth of my last Will and Testament.

ARTICLE SIXTH. I give and bequeath to my brother, Henry D. Knox, of the City of Buffalo, three hundred (300) shares of the common capital stock of F. W. Woolworth Company. I make no other provision for the benefit of my said brother, Henry D. Knox, for the reason that I have during my lifetime, made other provision for his benefit. *

ARTICLE SEVENTH. I give and bequeath unto Catherine Avery, cousin of my wife, who now resides at Los Angeles, California, One hundred (100) shares of the common capital stock of said F. W. Woolworth Company.

ARTICLE EIGHTH. I give and bequeath unto Benjamin F. White of East Aurora, five (5) of the trotting-bred horses owned by me at the time of my death; said horses to be selected by said Benjamin F. White. I also give and bequeath to said Benjamin F. White necessary harnesses for said horses so selected by him and two sulkyies; said harnesses and sulkies to be selected by him from the harnesses and sulkies owned by me at the time of my death, and that the remaining trotting-bred horses, sulkies, and harnesses be sold as hereinafter provided.

ARTICLE NINTH. I give and bequeath to the Home for the Friendless, located in the City of Buffalo, N. Y., One hundred

(400) shares of the common capital stock of said F. W. Woolworth Company; and to the Charity Organization of Buffalo, one hundred (100) shares of the common capital stock of said F. W. Woolworth Company.

ARTICLE TENTH. I give and bequeath unto the Buffalo Fine Arts Academy, Five hundred (500) shares of the common capital stock of said F. W. Woolworth Company.

ARTICLE ELEVENTH. I give and bequeath to the Methodist Episcopal Church located at Russell, St. Lawrence County, N. Y., Fifty (50) shares of the common capital stock of said F. W. Woolworth Company, in trust nevertheless, for the following purposes: the said shares of stock so bequeathed to be held or sold and the proceeds invested and, from time to time, reinvested, and the net income thereon used to assist in defraying the current expenses of said church.

122 ARTICLE TWELFTH. I give and bequeath unto William T. Damon, now in my employ, the full amount due or to become due to me upon a certain mortgage made by him to me and covering property situate on the shore of Lake Erie and in the Province of Ontario, Canada, and I direct my executors to cancel and discharge said mortgage.

ARTICLE THIRTEENTH. I give and bequeath unto Bankers Trust Company of Buffalo, a corporation organized under the laws of the State of New York, and doing business in the City of Buffalo, N. Y., and to Walter P. Cook of the City of Buffalo, N. Y., Two thousand (2,000) shares of the common capital stock of said F. W. Woolworth Company, in trust nevertheless, for the following uses and purposes, to-wit:

To receive, hold and, from time to time, in their discretion, to sell the same or portions thereof, and to invest and reinvest the same, or the proceeds thereof, and to collect the rents, income, issues, and profits on the property from time to time constituting such trust fund, and to pay over the net income arising therefrom in quarterly payments, to my sister, Carrie E. Fowler, during her natural life, and at the death of my said sister, Carrie E. Fowler, I give, devise, and bequeath the property then constituting such trust fund unto such person or persons and in such proportions as shall have been in that behalf appointed in and by the terms of the last Will and Testament duly executed of my said sister, Carrie E. Fowler, and in the event that my said sister, Carrie E. Fowler, shall fail to exercise such power of appointment, then at the death of my said sister, I give, devise, and bequeath the property constituting such trust fund unto her sons, Seymour K. Fowler and Raymond P. Fowler, share and share alike. In case of the prior death of either of said sons, the

123 issue of said deceased son to take the share to which the

parent would have been entitled if living. And in case of the prior death of both Seymour K. Fowler and Raymond P. Fowler leaving no issue then surviving, I give, devise, and bequeath the property constituting said trust fund to my heirs.

Notwithstanding the foregoing provision, I further will and direct that in event that my said sister Carrie E. Fowler, is living on the 1st day of January, in the year Nineteen hundred and thirty-three, the trust hereby created for her benefit shall then terminate, and I give, devise, and bequeath to my said sister, Carrie E. Fowler, in that event, all of the property then constituting said trust fund.

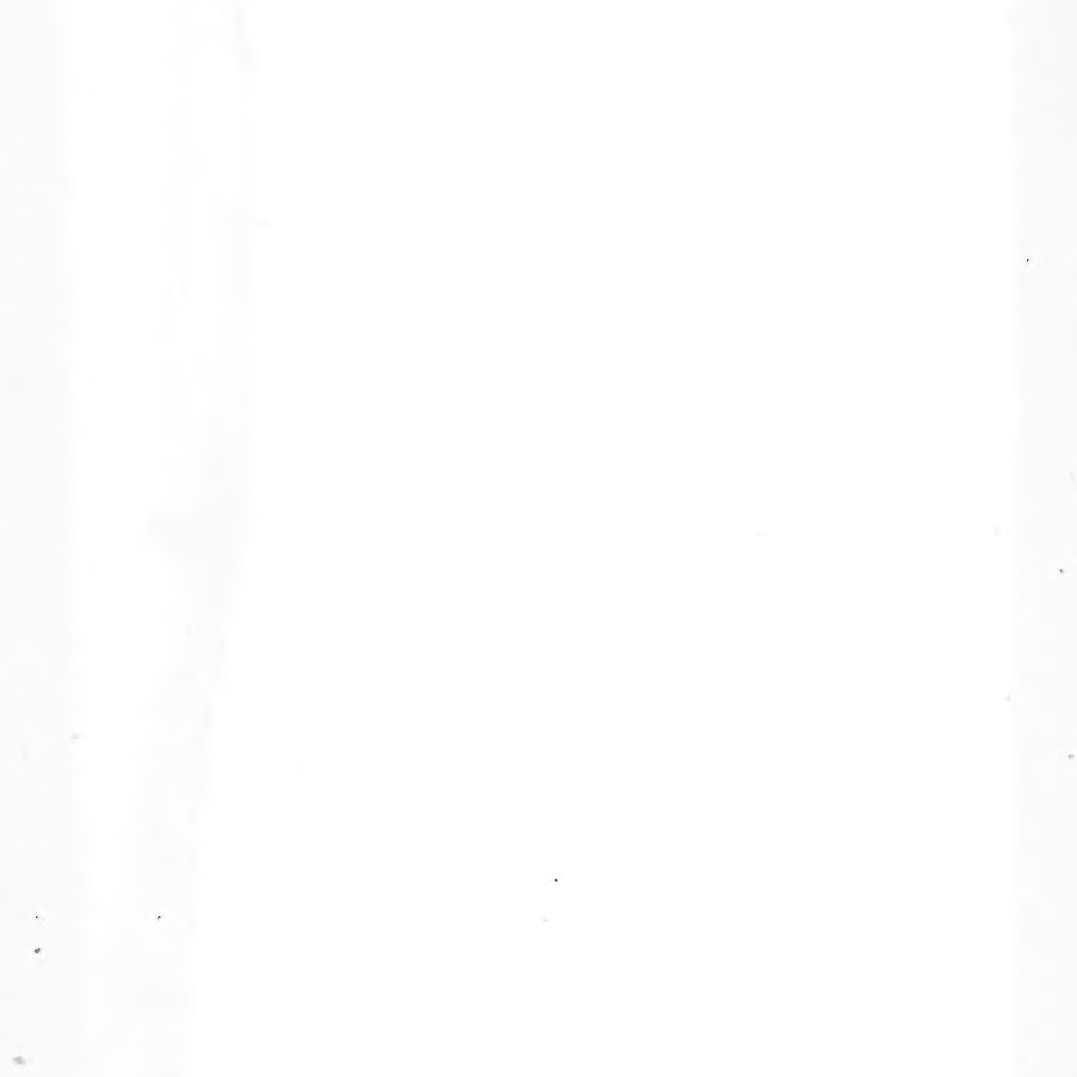
ARTICLE FOURTEENTH. I give and bequeath unto my nephew, Seymour K. Fowler, son of my sister, Carrie E. Fowler, Three Hundred (300) shares of the common capital stock of said F. W. Woolworth Company.

ARTICLE FIFTEENTH. I give and bequeath unto said Bankers Trust Company of Buffalo, a corporation organized under the laws of the State of New York, and Walter P. Cooke of the City of Buffalo, N. Y., Three hundred (300) shares of the common capital stock of said F. W. Woolworth Company, in trust nevertheless, for the following uses and purposes, to wit:

To receive, hold, and, from time to time, in their discretion, to sell the same or portions thereof and to invest and reinvest the same or the proceeds thereof, and to collect the rents, income, issues, and profits on the property from time to time constituting such trust fund and to pay over the net income arising therefrom, semi-annually, unto my nephew, Raymond P. Fowler,

son of my sister Carrie E. Fowler, until he shall arrive at 124 the age of twenty-five (25) years, at which time I give and

bequeath one-half of said trust fund to my nephew, Raymond P. Fowler, and direct my said trustees to pay over one-half of such trust fund to him and thereafter to pay to my said nephew, Raymond P. Fowler, the net income arising from the balance of said trust fund until he shall arrive at the age of thirty (30) years, at which time, I give, devise, and bequeath the balance of said trust fund to my said nephew, Raymond P. Fowler, and direct my said trustees to transfer and convey said property then constituting said trust fund to him. In case of the death of said Raymond P. Fowler before he shall arrive at the age of thirty (30) years, I give, devise and bequeath whatever property may remain in said trust fund unto his children, if any, to be divided among them, share and share alike, and if he shall leave no children then living, I give, devise and bequeath the balance of said trust fund to his brother, Seymour K. Fowler, if he then be living; if not, I give, devise, and bequeath the balance of said trust fund to my heirs.



ARTICLE SIXTEENTH. I give and bequeath unto Bankers Trust Company of Buffalo, a corporation organized under the laws of the State of New York, doing business in Buffalo, N. Y., and Walter P. Cooke of the City of Buffalo, N. Y., Two hundred fifty (250) shares of the common capital stock of said F. W. Woolworth Company, in trust nevertheless, for the following uses and purposes, to wit:

To receive, hold, and, from time to time, in their discretion, to sell the same or portions thereof and to invest and reinvest the same or the proceeds thereof, and to collect the rents, issues, income, and profits on the property from time to time constituting such trust fund and to pay over the net income arising therefrom semiannually, unto my niece, Verona Knox, daughter of my brother, Burtis L. Knox, until she shall arrive at the age of thirty (30) years, at which time I give, devise, and bequeath the property constituting said trust fund to my said niece, Verona Knox. In case of the death of my said niece, Verona Knox, before arriving at the age of thirty (30) years, I give, devise, and bequeath the property then constituting said trust fund unto her children, if any then living, share and share alike. If she shall have no children then living, I give, devise, and bequeath said trust fund unto her sister, Ethel Knox, if she be then living; if not, then to my heirs.

ARTICLE SEVENTEENTH. I give and bequeath unto the Bankers Trust Company of Buffalo, a corporation organized under the laws of the State of New York, and doing business at Buffalo, N. Y., and Walter P. Cooke of the City of Buffalo, N. Y., Two hundred fifty (250) shares of the common capital stock of said F. W. Woolworth Company, in trust nevertheless, for the following uses and purposes, to wit:

To receive, hold and, from time to time, in their discretion, to sell the same or portions thereof and to invest and reinvest the same or the proceeds thereof, and to collect the rents, incomes, issues, and profits on the property, from time to time constituting such trust fund and to pay over the net income arising therefrom semiannually, unto my niece, Ethel Knox, daughter of my brother, Burtis L. Knox, until she shall arrive at the age of thirty (30) years, at which time I give, devise, and bequeath the property constituting said trust fund to my said niece, Ethel Knox. In case of the death of my said niece, Ethel Knox, before arriving at the age of thirty (30) years, I give, devise, and bequeath the property constituting said trust fund unto her children, if any, share and share alike. If she shall have no children then living, I give, devise, and bequeath said trust fund unto her sister, Verona Knox, if she be then living; if not, then to my heirs.

ARTICLE EIGHTEENTH. I give and bequeath unto each of the children of my brother, Henry D. Knox, who may be living at the time of my death One hundred (100) shares of the common capital stock of said F. W. Woolworth Company.

ARTICLE NINETEENTH. I give and bequeath unto each household servant employed in or about my homes at Buffalo and East Aurora, including chauffeurs and stable employes, who have been in my employ at the time of my death for upwards of one (1) year, the sum of One hundred dollars (\$100) to each such servant for each and every year of such continuous employment prior to the date of my death, and I will and direct that the determination of my executors as to who is entitled to receive the legacy under this Article of my last Will and Testament and the period of employment of each such person, and the amount of the legacy hereunder which each is to receive, shall be final and conclusive and binding upon all parties.

ARTICLE TWENTIETH. I give and devise unto my son, Seymour H. Knox, the real property constituting my farm and summer home located at East Aurora, N. Y., together with the residence and all barns and other buildings and structures situate thereon and all stable and farming equipment used or purchased for use in connection with the same.

ARTICLE TWENTY-FIRST. In determining the amount of my residuary estate for the purpose of making distribution thereof as hereinafter provided, I direct that there be first set aside the following property, to wit:

All the shares of the capital stock owned by me at the time of my death in the following corporations: The Marine National Bank of Buffalo, a banking corporation having its principal place of business in the City of Buffalo, N. Y.; Bankers Trust Company of Buffalo, a corporation organized under the laws of the State of New York, having its principal place of business in the City of Buffalo, N. Y.; The Central National Bank of Buffalo, a banking corporation having its principal place of business in the City of Buffalo, N. Y.; Bankers Trust Company, a corporation organized under the laws of the State of New York, having its principal place of business in the City of New York, N. Y.; Irving National Bank, a corporation having its principal place of business in the City of New York, N. Y.; The Chase National Bank, a corporation having its principal place of business in the City of New York, N. Y.; which capital stock I have by subdivision (C) of this Article numbered "Twenty-first" of this my last Will and Testament, given and bequeathed to my brother, Henry D. Knox and Walter P. Cooke, in trust, for the benefit of my son, Seymour H. Knox.

All the rest, residue, and remainder of my property and estate, real, personal, and mixed, of every name, nature, and description, and wheresoever situate, but not including, however, the shares of the capital stock of the six corporations mentioned in the first paragraph of this Article Twenty-first of my last Will and Testament, I give, devise, and bequeath as follows:

(A) Forty (40) percent thereof (not including, however, 128 the shares of the capital stock of the six corporations mentioned in the first paragraph of this Article Twenty-first), I give, devise, and bequeath unto my brother Henry D. Knox and Walter P. Cooke, both of the City of Buffalo, N. Y., in trust nevertheless, for the following uses and purposes, to wit:

To receive, hold and from time to time, invest and reinvest the same, and to collect the rents, income, issues, and profits on the property from time to time constituting such trust fund and to pay over the net income arising therefrom quarterly unto my wife, Grace M. Knox, for and during the term of her natural life. At the death of my said wife, I give, devise, and bequeath one-half ($\frac{1}{2}$) of the property then constituting said trust fund unto such person or persons, corporation or corporations, and in such proportions as shall have been in that behalf appointed in the last Will and Testament, duly executed, of my said wife, Grace M. Knox; the remaining one-half ($\frac{1}{2}$) of the property constituting said trust fund, and in case my said wife shall have failed to exercise the power of appointment in reference to one-half ($\frac{1}{2}$) of said trust fund above mentioned, the entire property then constituting said trust fund, I will and direct shall be divided into three (3) equal parts or portions; one part or portion to be held by my said trustees for the benefit of my daughter, Dorothy Knox, and the net income thereon paid over to her semiannually, until she shall arrive at the age of thirty (30) years, at which time I give, devise, and bequeath said part or portion to my said daughter, Dorothy Knox; one part or portion to be held by my said trustees for the benefit of my son, Seymour H. Knox, and the net income thereon paid over to him semiannually, until he shall arrive at the age of thirty (30) years, at which time I 129 give, devise, and bequeath said part or portion to my said son, Seymour H. Knox; one part or portion to be held by my said trustees for the benefit of my daughter, Marjorie Knox, and the net income thereon paid over to her, semiannually, until she shall arrive at the age of thirty (30) years, at which time I give, devise, and bequeath said part or portion to my said daughter, Marjorie Knox. In case of the death of either or any of my said children before reaching the age of thirty (30) years, I give, devise, and bequeath the trust fund so held for the benefit

of either or any of my said children, unto the issue of such deceased child or children, share and share alike, and in case either or any of my said children shall die before reaching the age of thirty (30) years leaving no issue surviving, then I give, devise, and bequeath the property constituting said trust fund so held for the benefit of such deceased child or children unto my children who may then be living, to be divided between them share and share alike.

In the event that at the time of the death of my said wife, Grace M. Knox, any or all of my children shall be less than twenty-one (21) years of age, I direct that only so much of the income payable to such child or children, shall be used for the support and education of such child or children as my trustees shall deem wise and proper and that the remainder of said income shall be accumulated during the minority of such child or children and paid over when each such child arrives at the age of twenty-one (21) years.

(B) Twenty (20) percent of all the rest, residue, and remainder of my said estate (not including, however, the shares of the capital stock of the six corporations mentioned in the first paragraph of this Article Twenty-first) I give, devise, and bequeath to my brother Henry D. Knox and Walter P. Cooke, both of the City of Buffalo, in trust nevertheless, for the following uses and purposes, to wit:

130 To receive, hold, and, from time to time, invest and reinvest the same, and to collect the rents, income, issues and profits on the property from time to time constituting such trust fund and to pay over so much of the net income arising therefrom, as to my trustees shall seem wise and proper toward the support, maintenance, and education of my daughter, Dorothy Knox, until she shall arrive at the age of twenty-one (21) years, and to accumulate the balance of the income during her minority for her benefit, and to pay over such accumulated income to her when she shall arrive at the age of twenty-one (21) years, and thereafter to pay over the entire net income to my said daughter, Dorothy Knox, until she shall arrive at the age of twenty-eight (28) years, at which time I give, devise, and bequeath to my said daughter, Dorothy Knox, one-half ($\frac{1}{2}$) of the property then constituting said trust fund and I direct my said executors to pay over to my daughter, Dorothy Knox, the net income on the remaining one-half ($\frac{1}{2}$) of said trust fund until she shall arrive at the age of thirty-five (35) years, at which time I give, devise, and bequeath the remaining part of said trust fund to my said daughter, Dorothy Knox, and to her heirs and assigns forever.

In the event that my said daughter, Dorothy Knox, shall die before reaching the age of thirty-five (35) years, I give, devise,

and bequeath any part or portion of said trust fund, which has not then been paid over to her, or to the possession of which at the time of her death she was not entitled, unto the issue of said Dorothy Knox, if any, surviving her, to be divided among them, share and share alike. In case there be no issue her surviving, then I give, devise, and bequeath said trust fund unto her heirs.

(C) Twenty (20) percent of said rest, residue, and remainder of my property and estate, I give, devise, and bequeath
131 unto my brother, Henry D. Knox and Walter P. Cooke, both of the City of Buffalo, N. Y., together with all of the capital stock owned by me at the time of my death in the following corporations, to wit: The Marine National Bank of Buffalo, a banking corporation having its principal place of business in the City of Buffalo, N. Y.; Bankers Trust Company of Buffalo, a corporation organized under the laws of the State of New York, having its principal place of business in the City of Buffalo, N. Y.; The Central National Bank of Buffalo, a banking corporation having its principal place of business at Buffalo, N. Y.; Bankers Trust Company, a corporation organized under the laws of the State of New York, having its principal place of business in the City of New York, N. Y.; Irving National Bank, a corporation having its principal place of business in the City of New York, N. Y.; and The Chase National Bank, a corporation having its principal place of business in the City of New York, N. Y., in trust nevertheless, for the following uses and purposes, to wit:

To receive, hold and, from time to time, invest and reinvest the same, and to collect the rents, income, issues, and profits on the property from time to time constituting said trust fund and to pay over so much of the net income thereon as to my said trustees shall seem wise and proper toward the support, maintenance, and education of my son, Seymour H. Knox, until he shall arrive at the age of twenty-one (21) years, and to accumulate the balance of the income during his minority for his benefit, and to pay over such accumulated income to him when he shall arrive at the age of twenty-one (21) years, and thereafter to pay over the entire net income on said trust fund until he shall arrive at the age of twenty-five (25) years, at which time, I give,
132 devise, and bequeath to my said son, Seymour H. Knox, a portion of said trust fund, to wit, Five hundred thousand dollars (\$500,000), and direct my executors to pay over said sum of Five hundred thousand dollars (\$500,000) to my said son, Seymour H. Knox, and thereafter to pay over the net income on the trust fund remaining in their hands to my said son until he shall arrive at the age of thirty (30) years, at which time I give, devise and bequeath one-half (1/2) of the trust fund then

remaining in the hands of my said trustees to my said son, Seymour H. Knox, and I direct my said trustees to transfer and convey the same to him and thereafter to pay over the net income arising on the trust fund remaining in their hands to my said son, Seymour H. Knox, until he shall arrive at the age of thirty-five (35) years, at which time I give, devise, and bequeath the balance of said trust fund unto my said son, Seymour H. Knox. In case of the death of my said son, Seymour H. Knox, prior to the time when he shall arrive at the age of thirty-five (35) years, I give, devise, and bequeath all of said trust fund which may not then have been paid over to him, or to the possession of which he may not at the time of his death have been entitled, unto his issue, if any, him surviving, to be divided among them, share and share alike. And in the event that there be no issue him surviving, I give, devise, and bequeath the balance of said trust fund unto his heirs.

(D) Twenty (20) per cent of all the rest, residue, and remainder of my estate (not including, however, the shares of capital stock of the six corporations mentioned in the first paragraph of this Article Twenty-first) I give, devise, and bequeath to my brother, Henry D. Knox and Walter P. Cooke, both of the City of Buffalo, in trust nevertheless, for the following uses and purposes, to wit:

133 To receive, hold and, from time to time, invest and reinvest the same, and to collect the rents, income, issues, and profits on the property from time to time constituting such trust fund and to pay over so much of the net income arising therefrom, as to my said trustees shall seem wise and proper toward the support, maintenance, and education of my daughter, Marjorie Knox, until she shall arrive at the age of twenty-one (21) years, and to accumulate the balance of the income during her minority for her benefit, and to pay over the accumulated income to her when she shall arrive at the age of twenty-one (21) years, and thereafter to pay over the entire net income to my said daughter, Marjorie Knox, until she shall arrive at the age of twenty-eight (28) years, at which time, I give, devise, and bequeath to my said daughter, Marjorie Knox, one-half ($\frac{1}{2}$) of the property then constituting said trust fund and I direct my said trustees to pay over the net income on the remaining one-half ($\frac{1}{2}$) of said trust fund until she shall arrive at the age of thirty-five (35) years, at which time I give, devise, and bequeath the remaining part of said trust fund to my said daughter, Marjorie Knox, and to her heirs and assigns forever.

In the event that my said daughter, Marjorie Knox, shall die before reaching the age of thirty-five (35) years, I give, devise, and bequeath any part or portion of said trust fund, which has

not then been paid over to her, or to the possession of which at the time of her death she was not entitled, unto the issue of said Marjorie Knox, if any, surviving her, to be divided among them, share and share alike. And in case there be no issue her surviving, then I give, devise, and bequeath said trust fund unto her heirs.

ARTICLE TWENTY-SECOND. I hereby grant unto the trustees of
the various trusts created by this my last Will and Testa-
134 ment, with the same force and effect as though these provi-
sions were repeated separately in respect to each of said
trusts, full power and authority to invest and, from time to
time, reinvest all of the property and funds coming into the hands
of my various trustees, in such property, stock, bonds, and other
securities, as to the trustees of each said trust shall seem wise
and proper, whether or not such investments shall be those,
which, under the laws of the State of New York, an executor
and trustee is permitted to make, and without regard to limi-
tations or restrictions, hereby giving and granting unto such
trustees, full power and authority to receive from my executors
and to retain as a part of the trust funds in their hands any
and all stocks, bonds, or other securities, which may form a
part of my estate at the time of my death, and which they
shall receive from the executors thereof in the course of the dis-
tribution of my said estate, hereby granting unto my said trustees
full power and authority to exchange any stocks, bonds, or other
securities belonging to any trust for any stocks, bonds, or other
property upon any consolidation, merger, or reorganization of
any of the companies whose stocks or securities are so held by
me at the time of my death, or which may form a part of any
such trust fund at any time thereafter, and I hereby give and
grant unto my said trustees full power and authority to sell, lease,
convey, or dispose of any and all property, real, personal, or
mixed, which may at any time form a part or any or all of said
trust funds, and to execute leases, conveyances, and transfers
thereof, on such terms and conditions as to them shall seem
wise and proper.

It is my wish, however, which I hereby express to my trustees,
that within five (5) years after my death the property consti-
tuting the various trusts hereby created shall be so invested
that at least fifty (50) percent in value of each
135 of said trust funds shall be invested in securities then con-
stituting legal investments for savings banks, executors, or
trustees, or in unencumbered real property situate in the retail
business districts of cities of at least two hundred thousand
(200,000) population, unless in the opinion of my said trustees
additional time is required to accomplish such investments, and

then, and in that event, I desire that such investments be made at an early date after the expiration of said five (5) years.

ARTICLE TWENTY-THIRD. In addition to the powers hereinbefore conferred upon the trustees of the various trusts created by the terms of this my last Will and Testament, I hereby grant full power and authority to my said trustees to invest portions of the trust funds of any of the trusts herein created in unencumbered real estate situate in the retail business districts of any cities in the State of New York, having a population of more than two hundred thousand (200,000), provided, however, that not more than twenty (20) per cent of the value of any trust fund shall be at any one time so invested in real property.

ARTICLE TWENTY-FOURTH. I further will and direct that in the event that I shall own any or all of the following parcels of real estate, now owned by me, at the time of my death, that the same may be transferred by my executors to the trustees of any of the trusts created by the provisions of Article Twenty-first hereof, and accepted by said trustees as a part of said trust funds at the valuations fixed by the appraisers in the proceedings for determining the amount of the transfer tax under the laws of the State of New York:

The property known as Nos. 416-418 Main Street in the City of Buffalo, N. Y.;

136 The property known as Nos. 446-448 Main Street in the City of Buffalo, N. Y.;

The property now owned by me in the City of Kansas City, Mo.;

The property now owned by me in the City of Toledo, O.;

The property now owned by me in the City of Akron, O.

It is my suggestion to my executors and trustees, although not binding in case changed conditions shall render it unwise, that the property known as Nos. 416-418 Main Street, in the City of Buffalo, N. Y., shall become a part of the trust created for the benefit of my daughter, Dorothy Knox, and that the property known as Nos. 446-448 Main Street, in the City of Buffalo, N. Y., shall become a part of the trust created for the benefit of my daughter, Marjorie Knox.

ARTICLE TWENTY-FIFTH. I hereby further authorize and empower my said executors, in the administration of my said estate to determine and make the division of my property and estate unto the various trust funds created by the provisions of Article Twenty-first hereof, as in their judgment shall seem wise and proper, and I further authorize any of my said trustees in the event of a division being necessary of any trust funds hereby created in accordance with the terms and direction of this Will, to make such division both of real and personal property, and to

execute such conveyances and transfers as may be necessary to effect the same. The action of my executors and any of said trustees, pursuant to the authority of this my last Will and Testament, to be binding upon all parties interested in my estate and in any such trust fund. I further will and direct that should any parcel of real estate owned by me at the time of my death become a part of any of the trust funds created by the terms of Article Twenty-first of this my last Will and
137 Testament, at the appraised value thereof, as hereinbefore stated, that the trustees of the remaining trusts created by the terms of said Article Twenty-first hereof, shall upon request, execute proper and suitable conveyances of their interest in said parcel or parcels of real estate, so as to effectually vest the title thereof in the trustees of the trust fund of which said parcel of real estate may become a part.

ARTICLE TWENTY-SIXTH. I hereby nominate, constitute, and appoint my wife, Grace M. Knox, to be the executrix, and my brother, Henry D. Knox, and Walter P. Cooke, both of the City of Buffalo, to be the executors, of this my last Will and Testament, hereby giving and granting to my executors, full power and authority to sell and convey any and all property, real, personal, or mixed, of which I may die seized or possessed, or in which I may have any interest. I hereby will and direct that no bond or other security shall be required of my said executors or of any of the trustees of the various trusts created by this my last Will and Testament. I hereby will and direct that my executors shall have three (8) years from and after my decease in which to settle my estate and to distribute the same in accordance with the provisions hereof, and may retain from time to time as a part of my estate any and all real property, stocks, bonds, securities, and other property, which may form a part of my estate at the time of my death, hereby granting unto my said executors full power and authority to exchange such stocks, bonds, or other securities for any other stocks, bonds, or other property upon any consolidation, merger, or other reorganization of any of the companies whose stocks or securities are so held.

I hereby authorize my executors and trustees to pay out of the income and revenues of my said estate, or of each trust
138 fund herein created, all taxes or assessments which shall be imposed or assessed upon the real or personal property belonging to my estate or to any such trust fund, all amounts necessary for insurance premiums, repairs, and generally all other expenses necessary or proper in the management or preservation of such trust funds or estate, each such trust fund bearing so far as practicable, its own burden.

I further will and direct that in view of the provisions herein contained for her benefit, that my wife, Grace M. Knox, serve as executrix of this my last Will and Testament, without fees, commissions, or compensation, and I further will and direct that in lieu of the commissions and compensation provided by law, that each of my acting executors, administrators with the will annexed or trustees, whether herein appointed or appointed by the court, excepting only the Bankers Trust Company of Buffalo, as Trustee of the various trusts created by Articles Thirteenth, Fifteenth, Sixteenth, and Seventeenth hereof, shall during his service as such, receive an annual compensation of Twelve thousand dollars (\$12,000) each, to be paid out of the income of my estate and the trust funds herein contained and apportioned ratably between the said estate and the said trust funds created by the provisions of Article Twenty-first hereof in substantial proportion to the value of the property contained in each, from time to time, such sum to be received in full payment for his services as such executor, administrator and trustee under this Will, and to cover the entire services of each, both as executor, administrator, and trustee. I hereby expressly will and direct that the appointment of any other executor, trustee, or administrator with the will annexed which may be made by any court, shall be upon the express condition that every such executor, trustee, or administrator shall at the time of his appointment, accept the compensation 139 above provided for his services, in lieu of commissions or compensation provided by law. I will and direct that the Bankers Trust Company of Buffalo in acting as trustee of Articles Thirteenth, Fifteenth, Sixteenth, and Seventeenth hereof shall receive the usual commissions for such services as allowed by law.

Any executor or trustee however, may during the period of his administration of my estate serve as director, officer, or attorney of corporations whose stocks, bonds, or other securities may form a part of my estate, or any trust fund, and may be compensated for such service by such corporations.

ARTICLE TWENTY-SEVENTH. I hereby will and direct that any reference contained in this my last Will and Testament to my executors or to my trustees shall be deemed and construed to refer with equal force to the survivor or survivors of any of my executors or to the survivor or survivors of any trustees of any trust fund herein mentioned, and to any additional executors or trustees when their appointment is effected. And I hereby nominate, constitute, and appoint my son, Seymour H. Knox, to be one of the executors of this my last Will and Testament and one of the trustees of every trust herein created upon his

reaching the age of twenty-one (21) years and with the same force and effect as though he were now included as an executor and as a trustee of each of the trusts hereby created, and subject to the same provisions as to compensation as herein provided for my executors, other than my wife and the Bankers Trust Company of Buffalo.

ARTICLE TWENTY-EIGHTH. The provisions herein contained for the benefit of my said wife, Grace M. Knox, are to be
140 accepted by her in lieu of any dower or right of dower in any real property of which I may die seized or possessed, or in which I may have any interest, and are also to be received by her in lieu of any right to receive fees, commissions, or other compensation as executrix of this my last Will and Testament.

ARTICLE TWENTY-NINTH. I hereby will and direct that no one of my children shall be charged with any advance or advancements made by me to such children during my lifetime.

ARTICLE THIRTIETH. It is my desire if my executors approve, that all of my trotting-bred horses, harnesses, and sulkies, used in connection therewith, owned by me at the time of my death, excepting only such as may be selected by Benjamin F. White, pursuant to the provisions of Article Eighth hereof, be sold by my executors at the Fasig-Tipton Sales in New York City.

ARTICLE THIRTY-FIRST. I will and direct that the income on the trusts created by Article Twenty-first of this will shall commence from the time of my death, and I authorize and direct my executors to make payments on account of said income in their discretion prior to the creation of the trusts, which payments shall be accepted by the beneficiaries in lieu of corresponding payments from the trustees.

ARTICLE THIRTY-SECOND. I direct that my executors be not required to file any inventory of my said estate.

I direct my executors to make, from time to time, at the request of any of the beneficiaries of any of the trusts herein created, semiannual statements certified by them, showing as
141 to each beneficiary the condition of the trust estate in which he or she is interested, and the receipts, disbursements, sales, and investments in connection therewith.

ARTICLE THIRTY-THIRD. I hereby nominate, constitute, and appoint my wife, Grace M. Knox, to be the Testamentary Guardian of my three children, Dorothy Knox, Seymour H. Knox, and Marjorie Knox.

ARTICLE THIRTY-FOURTH. In case for any reason any legacy or devise herein contained shall lapse or shall become, for any reason whatever, incapable of performance, then and in that

event, I give, devise, and bequeath such legacy and devise of real estate, in case any part of it shall consist of real estate, to my said wife, Grace M. Knox, knowing that she will, so far as possible, carry out my express desires in relation to the same.

ARTICLE THIRTY-FIFTH. I hereby revoke and forever annul any and all other will or wills and codicils thereto by me at any time made.

In witness whereof, I have hereunto set my hand and seal this twelfth day of May, in the year of our Lord one thousand nine hundred and fifteen (1915).

SEYMOUR H. KNOX. [SEAL].

The foregoing instrument, consisting of twenty-three (23) pages, was on the day of the date thereof, signed, sealed, published, and declared by the Testator therein named, as and for his last Will and Testament, in the presence of us and each 142 of us, who, at his request and in his presence and in the presence of each other, have hereunto set our names as attesting witnesses thereto.

DAN'L J. KENEFICK,
Residing at Buffalo, N. Y.

GUY WELLMAN,
Residing at Buffalo, N. Y.

CHARLES H. TAYLOR,
Residing at Buffalo, N. Y.

143

Respondent's exhibit A

At a Surrogate's Court held in and for the County of Erie, State of New York, at the Surrogate's Office, in the City of Buffalo, in said County, on the 24th day of May 1921.

Present: Hon. Louis B. HART, Surrogate.

In the matter of the Judicial Settlement of the Accounts of Grace M. Knox, Henry D. Knox, and Walter P. Cooke, as Executors of the Last Will and Testament of Seymour H. Knox, Deceased.

Grace M. Knox, Henry D. Knox, and Walter P. Cooke, as Executors of the Last Will and Testament of Seymour H. Knox, late of the City of Buffalo, in said county, deceased, having heretofore presented to this court their petition praying for a judicial settlement of their accounts as such executors, dated December 20, 1920, and this court having thereupon duly issued a citation requiring the persons interested in the estate of said deceased named in said petition to be and appear in this court on the 1st day of February 1921, at ten o'clock in the forenoon of that day and attend

the judicial settlement of the account of the said executors,
144 And satisfactory proof having been filed of the due service of said citation personally within the State on Dorothy Knox Goodyear, Seymour H. Knox, Marjorie Knox, and Grace M. Knox as appears by the affidavit of William C. Warren, Jr., verified the 7th day of January 1921, presented to and filed with this court, and said petitioners having presented to and filed with this court an instrument in writing signed by Burtis L. Knox, legatee, and a person interested in the estate of said deceased, acknowledged and approved as required by law, in which he waives the issue and service on him of a citation to attend said judicial settlement and consents to the making of this decree;

And Louis E. Desbecker, Esq., counselor at law, having been duly appointed special guardian for said Marjorie Knox, infant, by an order duly made in this proceeding by this court, and said Louis E. Desbecker having executed his written consent, to act as such special guardian, and having verified the usual affidavit of his ability to act as such special guardian and said consent and affidavit having been duly filed with said court in this proceeding, and this proceeding having been duly and regularly adjourned to this day and this day appeared the said petitioners in person and by Daniel J. Kenefick Esq., their attorney, and said Marjorie Knox having appeared by said Louis E. Desbecker, her special guardian, and by Grace M. Knox, her mother and guardian, and said Grace M. Knox, Henry D. Knox, and Walter P. Cooke as such executors having presented and filed their account, together with vouchers in support thereof, and said Louis E. Desbecker having executed his consent and recommendation in writing to the effect that the account submitted by the executors should be
passed and judicially settled as filed and that this decree

145 submitted to him is in all respects satisfactory, which consent and recommendation is hereto attached and made a part of this decree.

Now on motion of Daniel J. Kenefick, Esq., attorney for said executors, and after hearing the proofs and allegations of the parties and examining said account and due deliberation having been had thereon,

I. It is ordered, adjudged, and decreed that the account of said Grace M. Knox, Henry D. Knox, and Walter P. Cooke as such executors, dated December 20, 1920, be and the same hereby is finally and judicially settled and allowed as filed and the Surrogate makes and records the following summary thereof:

The executors are debited and credited as follows:

DEBIT

With amount of Schedule A----- \$26, 233, 760. 31

CREDIT

With amount of Schedule B-----	\$20, 671, 098. 49	
With amount of Schedule C-----	1, 172, 186. 00	
With amount of Schedule D-----	551, 755. 95	
With amount of Schedule E-----	3, 493, 406. 83	25, 888, 447. 27
		<hr/> \$345, 313. 04

II. And it is further ordered that out of said balance the said executors pay to Louis E. Desbecker, Esq., the said special guardian, the sum of \$5,000.00 hereby awarded him in full of his compensation for services rendered in this proceeding.

146 III. And it appearing to the satisfaction of this court that the executors were authorized and directed by Article Second of the will of the testator to cause to be erected in Forest Lawn Cemetery in the City of Buffalo, N. Y., a suitable monument and mausoleum at an expense of not exceeding \$50,000, and that pursuant to said authority and direction, the executors have caused to be erected in Forest Lawn Cemetery in the City of Buffalo, N. Y., a mausoleum at an expense of \$25,345.83,

It is ordered, adjudged, and decreed that the action of the executors in causing said mausoleum to be erected and in expending therefor the sum of \$25,345.83 be and the same hereby is ratified and approved.

IV. And it appearing to the satisfaction of this court that the testator by the Eleventh clause of his will bequeathed to the Methodist Episcopal Church located at Russell, St. Lawrence County, New York, fifty shares of the common capital stock of F. W. Woolworth Company in trust for the following purposes, the shares of stock so bequeathed to be held or sold and the proceeds invested and from time to time reinvested and the net income thereon used to assist in defraying the current expenses of said church; and that in accordance with said bequest the executors on or about the 14th day of March, 1916, transferred fifty shares of the common capital stock of the F. W. Woolworth Company to The Board of Trustees of the Methodist Episcopal Church of Russell, N. Y., upon said corporation entering into an agreement under seal to hold the same in trust for the purpose and upon the terms and conditions set forth in Article Eleventh of the will of the testator,

147 It is ordered, adjudged, and decreed that the action of the executors in transferring and delivering said stock to said corporation upon its executing said agreement, be and the same hereby is ratified and approved.

V. And it appearing that by the Fifth article of the will of the testator, he had bequeathed an annuity of \$1,200 per year to his brother, Burtis L. Knox, and directed his executors to pay over said annuity to said Burtis L. Knox in quarterly payments of \$300 during his natural life, and that the testator directed his executors to set aside the sum of \$30,000 for the purpose of producing said annuity and that at the death of said Burtis L. Knox, the testator devised and bequeathed the property so set aside to produce said annuity to his son, Seymour H. Knox, if he be then living, if not, to his daughters, Dorothy Knox and Marjorie Knox, to be divided between them share and share alike; and that he further provided that notwithstanding the foregoing provisions in case said Burtis L. Knox should be living on the 1st day of January 1933, that in that event all the property held to provide such annuity should become the property of said Burtis L. Knox.

It is further ordered, adjudged, and decreed that said executors be and they hereby are ordered and directed to set aside \$30,000 and to hold and invest the same for the purposes and upon the terms and conditions set forth in Article Fifth of the will of the testator and that such sum be deemed to have been set aside as of the death of the testator and the annual payment of \$1,200 made in each year by the executors to said Burtis L. Knox shall be accepted by him with the same force and effect as though paid for the income derived from said sum of \$30,000.

148 VI. The Surrogate notes that the trustees of the various trusts created by the will of the testator, including Seymour H. Knox, now of full age, have duly executed their oaths and consents to act as trustees of the several trusts, and that the same are on file in this court, and that Seymour H. Knox, having become of age has qualified as executor by executing his oath of office which is on file in this office.

VII. And it appearing from the account to the satisfaction of this court that the total amount of income received by the executors from the time of their appointment to the date of said account is \$6,366,973.35, and that the expenses of administration, executors' compensation, taxes, etc., properly deductible therefrom amount to \$538,912.36 leaving a net income of \$5,828,860.99; and it further appearing that of said amount the sum of \$1,109,896.89 represents income on the bank stock specifically bequeathed in trust for Seymour H. Knox by paragraph C of Article Twenty-first of the will of the testator; and it further appearing that the balance of the net income after deducting an annuity of \$1,200 per year payable to Burtis L. Knox should be divided as follows: Grace M. Knox, 40%; Dorothy Knox Goodyear, 20%; Seymour H. Knox, 20%; and Marjorie Knox, 20%; and that during the

period embraced in this accounting the whole of said income has not been so distributed and that the said parties are entitled to interest on the undrawn portion of their distributive shares thereof as follows:

Seymour H. Knox	\$141,105.49
Grace M. Knox	56,453.48
Dorothy Knox Goodyear	46,789.79
Marjorie Knox	71,335.96

Total \$315,684.72

149 which said amount, together with said sum of \$1,109,896.89 payable to Seymour H. Knox as aforesaid should be deducted from said net income leaving a balance of \$4,402,479.38 to be distributed as follows:

40% to Grace M. Knox	\$1,760,991.75
20% to Seymour H. Knox	880,495.87
20% to Dorothy Knox Goodyear	880,495.88
20% to Marjorie Knox	880,495.88

And it further appearing that the payments on account of income during the period covered by this accounting are as follows:

Grace M. Knox	\$1,319,979.39
Seymour H. Knox	669,105.68
Dorothy Knox Goodyear	449,774.67
Marjorie Knox	290,422.11

And it further appearing that during the period covered by this accounting the executors have expended certain moneys for bank stocks for Seymour H. Knox having in his behalf exercised certain rights to purchase stock coming to them by virtue of the holdings of stocks specifically bequeathed for him and that the amount of money so invested less the cash distribution of principal received by virtue of said holdings, amounts to \$41,512.98, which should be deducted from income due him.

And it further appearing that the amount now due to each of said interested parties on account of income to the date of the report is as follows:

150 Grace M. Knox 40% of net income	\$1,760,991.75
Interest	56,453.48
	1,817,445.23
Less amount drawn	669,105.68
Balance due	497,465.84
Seymour H. Knox 20% of net income	880,495.87
Interest on undrawn income	141,105.49
Bank dividends	1,109,896.89
	2,131,498.25
Less amount drawn	669,105.68
Balance	1,462,392.59

Less bank investments-----	\$41,512.96
Balance due-----	1,420,879.61
Dorothy Knox Goodyear 20% of net income-----	880,495.88
Interest on undrawn income-----	46,789.79
	927,285.67
Less amount drawn-----	449,774.67
Balance due-----	477,511.00
Marjorie Knox 20% of net income-----	880,495.88
Interest on undrawn income-----	71,335.96
	951,831.84
Less amount drawn-----	260,422.11
Balance due-----	691,409.73

Respondent's Exhibit A.

151 It is further ordered, adjudged, and decreed that the executors pay to Grace M. Knox, Seymour H. Knox, Dorothy Knox Goodyear, and Marjorie Knox, the above-mentioned balances in full of all unpaid income and interest thereon due to the date of this accounting and that up to the sum of \$477,511, being the lowest amount of said income payments due, the executors pay the same by transferring and delivering to the parties entitled thereto bonds belonging to the estate at their appraised value or cost, and that the balance of said amounts be paid in cash or at the election of the parties entitled to receive said payments in securities at their appraised value or cost, but at no lesser value than present market.

And it is further ordered, adjudged, and decreed that the above balance of \$691,409.73 directed to be paid to Marjorie Knox be paid to Henry D. Knox, Walter P. Cooke, and Seymour H. Knox as Trustees for Marjorie Knox, and that the same be paid \$477,511 in bonds and the balance in cash or securities as hereinabove directed.

VIII. And it appearing to the satisfaction of this Court that the sales, purchases, and exchanges of properties and securities made by executors during the period embraced by this account were in accordance with the authority vested in them by the will of the testator, and were also to the best interest of said estate and the persons interested therein.

It is ordered, adjudged, and decreed that the action of the executors in making the various exchanges, purchases, and sales of properties and securities as set forth in said account be and the same hereby are ratified and approved.

152 IX. And it is further ordered, adjudged, and decreed that all payments of income made by the executors or herein directed to be made by them, shall be construed to be and shall be accepted by the various interested parties as payments of income on account of their respective interests in the estate and in the trusts created for their benefit with the same force and effect as though paid to them by the Trustees named in said Last Will and Testament of Seymour H. Knox, deceased, and said trustees shall be and they hereby are relieved and exonerated from paying to the said interested parties any income on said trusts funds from the period covered by said account.

X. And it appearing by Article Twenty-fourth of the will of the testator that it was the wish of the testator that the property known as 416-418 Main Street in the City of Buffalo, New York, should become a part of the trust created for the benefit of Dorothy Knox Goodyear, and that the property known as 446-448 Main Street, Buffalo, N. Y., should become a part of the trust created for the benefit of Marjorie Knox,

It is ordered, adjudged, and decreed that the executors transfer and convey to Henry D. Knox, Walter P. Cooke, and Seymour H. Knox, as Trustees for the benefit of Dorothy Knox Goodyear, pursuant to the provisions of paragraph B of Article Twenty-first of said will said property known as 416-418 Main Street in the City of Buffalo, New York, at the value of \$414,000, being the appraised value thereof.

153 And it is further ordered, adjudged, and decreed that the executors transfer and convey to Henry D. Knox, Walter P. Cooke, and Seymour H. Knox as trustees for the benefit of Marjorie Knox, pursuant to the provisions of paragraph D of Article Twenty-first of said will said property known as 446-448 Main Street in the City of Buffalo, N. Y., at the value of \$464,439.89, being the appraised value of said property plus the cost of improvements made by the executors.

XI. It is further ordered, adjudged, and decreed that the executors in their discretion distribute the balance of the real estate in their hands at the appraised value of the several parcels between the trusts created for the benefit of Grace M. Knox by the provisions of paragraph A of Article Twenty-first of the will of the testator and the trust created for the benefit of Seymour H. Knox pursuant to the provisions of Paragraph C of Article Twenty-first of the will of the testator.

And is it further ordered, adjudged, and decreed that the executors on conveying the real estate to the various trusts or so much as they may determine to convey to the trusts, shall concurrently therewith transfer to the trustees of each of said four

trusts, sufficient securities belonging to the estate at their appraised value or cost to equalize the difference in the value of the parcel or parcels of real estate received by each of said trusts, to the end that the appraised value of such real estate and such securities so transferred to equalize such value shall be equal as to each of such trusts except that the trust created for the benefit of Grace M. Knox shall be twice the amount of either of the others.

XII. And it appearing further that the testator by the provisions of Article Twenty-fifth of his said will has authorized and empowered his executors in the administration
154 of his said estate to determine and make division of his property and estate among the various trust funds created by the provisions of Article Twenty-first thereof as in their judgment shall seem wise and proper.

It is further ordered, adjudged, and decreed that the executors shall from time to time as in their judgment seems wise and proper, make division of the property and estate remaining in their hands, or so much thereof as from time to time they think wise, after making provision for carrying out the terms and conditions of this decree into the various trust funds created by the provisions of said last will and testament and in accordance with the terms thereof, any balance of cash or property remaining in the hands of the executors to be subject to the payment therefrom of any further debts or obligations of the testator and the expenses of administration and final distribution in accordance with the terms of said will.

And it is further ordered, adjudged, and decreed, that from and after the creation of said trust funds the executors and trustees may in their discretion apportion the expenses of administration and the other disbursements among the four trusts hereinbefore mentioned and the estate, so long as any portion of said estate remains undivided.

The Surrogate notes that the executors have this day filed in this court receipts and releases duly executed by the following named legatees showing full payment of the several specific bequests to them contained in the will of the testator: Henry D. Knox, Burtis L. Knox, Catherine Avery, The Home of the Friendless, the Charity Organization Society of Buffalo,
155 Buffalo Fine Arts Academy, William T. Damon, Seymour K. Fowler, Sherman Damon, Charles Knowlton, Bertha L. Daigler, Lucy Kranichfeld, Margaret Reilly, Benjamin F. White, (2) Paul J. Kingston, John Thoman, William Timm, Herman Timm, Edward Kingston, Louis Sissler, Charles Curtis, Charles Sissler, Aloise Burghardt; also receipt and release duly executed by Henry D. Knox, General Guardian of Priscilla

Knox, Alice Knox, and James H. Knox, showing full payment of the specific bequests to them contained in the will of the testator; also receipts and releases duly executed by Bankers Trust Company of Buffalo and Walter P. Cooke, as trustees, showing the receipt by them of the property bequeathed in trust by the will of the testator for Verona Knox, Ethel Knox, Carrie D. Fowler and Raymond P. Fowler; also receipt and release executed by the Board of Trustees of the Methodist Episcopal Church of Russell, N. Y., showing the receipt of the property specifically bequeathed in trust by the will of the testator, together with an agreement executed by the Board of Trustees of the Methodist Episcopal Church of Russell, N. Y., to hold said property in trust in accordance with the terms of the will of the testator.

L. B. HART, *Surrogate*.

STATE OF NEW YORK,

County of Erie, Surrogate's Office, ss:

I, George T. Vandermeulen, Clerk of the Surrogate's Court of the said county of Erie, do hereby certify that I have compared the foregoing and annexed copy of Decree—in the matter
156 of the judicial settlement of the accounts of Grace M. Knox, Henry D. Knox and Walter P. Cooke, as executors of the Last Will and Testament of Seymour H. Knox, deceased with the original record thereof now remaining in this office, and have found the same to be a correct transcript therefrom, and of the whole of such original record.

[SEAL]

In witness whereof, I have hereunto set my hand and affixed the seal of said Surrogate's Court, at Buffalo, N. Y., this 12th day of December 1938.

No. 53273.

G. T. VANDERMEULEN,
Clerk of Surrogate's Court.

[Surrogate's Court, Erie County. In the Matter of the Judicial Settlement of the Accounts of Grace M. Knox and others as executors of vs. Seymour H. Knox, Deceased. Decree.]

157 Before United States' Board of Tax Appeals

Docket No. 84640

[Same title.]

R. M. Andrews, Esq., John L. Kenefick, Esq., and Ernest J. Brown, Esq., for the petitioner. W. H. Schwatka, Esq., and E. L. Updike, Esq., for the respondent.

Memorandum opinion

MURDOCK. The Commissioner determined a deficiency of \$65,549.60 in income tax of the petitioner for the calendar year 1933. The only question for decision is the basis for gain or loss in the hands of the petitioner of securities which were distributed to her in accordance with a trust established for her under the will of her father. The Board adopts as its findings of fact the stipulation filed by the parties, together with the respondent's exhibit A.

Seymour H. Knox, the father of the petitioner, died on May 16, 1915. His will provided that the residuary estate should be divided into four parts, and that one part, consisting of 20 percent of the whole, be placed in trust for this petitioner. The will provided, with respect to the portion placed in trust for this petitioner, that it was so placed for the following uses and purposes:

158 "To receive, hold and, from time to time, invest and reinvest the same, and to collect the rents, income, issues, and profits on the property from time to time constituting such trust fund and to pay over so much of the net income arising therefrom, as to my trustees shall seem wise and proper toward the support, maintenance, and education of my daughter, Dorothy Knox, until she shall arrive at the age of twenty-one (21) years, and to accumulate the balance of the income during her minority for her benefit, and to pay over such accumulated income to her when she shall arrive at the age of twenty-one (21) years, and thereafter to pay over the entire net income to my said daughter, Dorothy Knox, until she shall arrive at the age of twenty-eight (28) years, at which time I give, devise, and bequeath to my said daughter, Dorothy Knox, one-half ($\frac{1}{2}$) of the property then constituting said trust fund and I direct my said executors to pay over to my daughter, Dorothy Knox, the net income on the remaining one-half ($\frac{1}{2}$) of said trust fund until she shall arrive at the age of thirty-five (35) years, at which time I give, devise, and bequeath the remaining part of said trust fund to my said daughter, Dorothy Knox, and to her heirs and assigns forever.

"In the event that my said daughter, Dorothy Knox, shall die before reaching the age of thirty-five (35) years, I give, devise, and bequeath any part or portion of said trust fund, which has not then been paid over to her, or to the possession of which at the time of her death she was not entitled, unto the issue of said Dorothy Knox, if any, surviving her, to be divided among them,

share and share alike. In case there be no issue her surviving, then I give, devise, and bequeath said trust fund unto her heirs."

It further provided that the trustees should have full power to sell, exchange, or dispose of any property in the trust fund, and expressed the wish of the testator that within five years after his death, or as soon thereafter as possible, 50 percent of the value of the trust fund should be invested in securities constituting legal investments for executors or trustees or in unencumbered real property.

The petitioner attained the age of twenty-eight years on August 26, 1924, and on that day received a distribution in accordance with the terms of the trust created by the will, and she reached her thirty-fifth birthday on August 26, 1931, at which time she received an additional distribution in accordance with the trust created by the will of her father. She had a number of transactions in the taxable year involving securities which she received in the two distributions, some of which were securities purchased by the trustees, some were securities purchased by the executors, and some were securities owned by her father at the date of his death. She contends that her basis in every instance is the fair market value of those securities on the date of distribution, whereas the respondent contends that her basis is cost to the executors or trustees, fair market value at the date the property was transferred from the executors to the trustees, or fair market value at the date of the decedent's death, depending upon when the securities were originally acquired.

The question of whether the petitioner is entitled to use as her basis for gain or loss the fair market value of the property at the time it was distributed to her is decided for the petitioner on authority of *Marjorie K. Campbell*, 39 B. T. A. No. 138 (5/19/39) and cases there cited. The trusts in the two cases were created by the same will and are substantially identical.

Decision will be entered under Rule 50.

Enter:

Entered May 19, 1939.

160 Before United States Board of Tax Appeals

Docket No. 84640

[Same title.]

Decision

The respondent on June 13, 1939, filed a proposed computation pursuant to the Board's Memorandum Opinion entered May 19, 1939. The petitioner on June 23, 1939, filed a notice of acqui-

escence to the respondent's computation. Therefore, it is ordered and decided, that there is no deficiency in income tax for the year 1933.

(Signed) J. E. MURDOCK,
Member, United States Board of Tax Appeals.

Enter:

Entered June 30, 1939.

161 In United States Circuit Court of Appeals for the
Second Circuit

BTA Docket No. 84640

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER ON REVIEW

vs.

DOROTHY K. G. ROGERS, RESPONDENT ON REVIEW

Petition for review and assignments of error

Filed Sept. 22, 1939

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

Now comes Guy T. Helvering, Commissioner of Internal Revenue, by his Attorneys, Samuel O. Clark, Jr., Assistant Attorney General, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and Claude R. Marshall, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I

JURISDICTION

That the petitioner on review (hereinafter referred to as the Commissioner) is the duly appointed, qualified, and acting Commissioner of Internal Revenue, appointed and holding his office by virtue of the laws of the United States; that Dorothy K. G. Rogers, the respondent on review (hereinafter sometimes referred to as the taxpayer) is an individual residing at Buffalo, New York; that the said Dorothy K. G. Rogers filed her Federal individual income tax return for the taxable year 1933 in the office of the Collector of Internal Revenue for the Twenty-eighth District of New York, located at Buffalo, New York, which said collection district is within the jurisdiction of

the United States Circuit Court of Appeals for the Second Circuit.

The Commissioner seeks a review of the decision of the United States Board of Tax Appeals by virtue of the provisions of the Revenue Act of 1926, Sections 1001-1005, c. 27, 44 Stat. 9, as amended by the Revenue Act of 1928, Section 603, c. 852, 45 Stat. 873, and further amended by the Revenue Act of 1932, Section 1101, c. 209, 47 Stat. 169, and as further amended by the Revenue Act of 1934, Section 519, c. 277, 48 Stat. 680, and subsequent revenue acts.

II

PRIOR PROCEEDINGS

On February 27, 1936, the Commissioner of Internal Revenue, pursuant to the provisions of Section 272 (a) of the Revenue Act of 1932, as amended by Section 501 of the Revenue Act of 1934 (49 Stat. 755) sent the taxpayer by registered mail a notice of deficiency advising her that the determination of her income tax liability for the taxable year 1933 disclosed a deficiency in the amount of \$65,549.60. Thereafter on May 25, 1936, a petition was filed by the taxpayer with the United States Board of Tax Appeals requesting a redetermination of the deficiency determined in the aforesaid notice of deficiency. On July 24, 1936, the Commissioner filed an answer to the petition, wherein he affirmatively claimed an increased deficiency. On September 5, 1936, the taxpayer filed her reply. On December 13, 1938, the taxpayer filed a motion to file amendments to petition and on the same day lodged an "amendment of petition." The motion to amend the petition having been granted, the Commissioner on December 14, 1938, filed an answer to the amendment of petition.

This proceeding and the cases of Marjorie K. Campbell, Docket No. 84639, and Seymour H. Knox, Docket No. 77827, were heard on December 14, 1938, at Washington, D. C. On May 19, 1939, the Board entered its memorandum opinion. On June 30, 1939, the Board entered its decision ordering and deciding that there is no deficiency in tax for the year 1933.

III

NATURE OF CONTROVERSY

Seymour H. Knox, the father of the taxpayer, died on May 16, 1915. His will provided that the residuary estate should be divided into four parts and that one part, consisting of 20 per-

cent of the whole, be placed in trust for this petitioner. The will provided, with respect to the portion placed in trust for this petitioner, that it was so placed for the following uses and purposes:

"To receive, hold and, from time to time, invest and reinvest the same, and to collect the rents, income, issues, and profits on the property from time to time constituting such trust fund and to pay over so much of the net income arising there-
164 from, as to my trustees shall seem wise and proper toward the support, maintenance, and education of my daughter, Dorothy Knox, until she shall arrive at the age of twenty-one (21) years, and to accumulate the balance of the income during her minority for her benefit, and to pay over such accumulated income to her when she shall arrive at the age of twenty-one (21) years, and thereafter to pay over the entire net income to my said daughter Dorothy Knox, until she shall arrive at the age of twenty-eight (28) years, at which time I give, devise, and bequeath to my said daughter, Dorothy Knox, one-half ($\frac{1}{2}$) of the property then constituting said trust fund and I direct my said executors to pay over to my daughter, Dorothy Knox, the net income on the remaining one-half ($\frac{1}{2}$) of said trust fund until she shall arrive at the age of thirty-five (35) years, at which time I give, devise, and bequeath the remaining part of said trust fund to my said daughter, Dorothy Knox, and to heirs and assigns forever.

"In the event that my said daughter, Dorothy Knox, shall die before reaching the age of thirty-five (35) years, I give, devise, and bequeath any part or portion of said trust fund, which has not then been paid over to her, or to the possession of which at the time of her death she was not entitled, unto the issue of said Dorothy Knox, if any, surviving her, to be divided among them, share and share alike. In case there be no issue her surviving, then I give, devise, and bequeath said trust fund unto her heirs."

The will further provided that the trustees should have full power to sell, exchange, or dispose of any property in the trust fund, and expressed the wish of the testator that within
165 five years after his death, or as soon thereafter as possible, 50 percent of the value of the trust fund should be invested in securities constituting legal investments for executors or trustees or in unencumbered real property.

The trust was formally set up on July 1, 1921, and the property provided by the will was transferred of record and delivered to the trustees.

The taxpayer attained the age of twenty-eight on August 26, 1924, and on that date the trustees, pursuant to the will, transferred of record and delivered to the taxpayer certain securities, and on August 26, 1931, she reached her thirty-fifth birthday and on that date the trustees pursuant to the will, transferred of record and delivered to the taxpayer certain securities. She had a number of transactions in the taxable year involving certain of the securities transferred and delivered to her by the trustees aforesaid, some of which were securities purchased by the trustees, some were securities purchased by the executors, and some were securities owned by her father at the date of his death. She contended that in accordance with the third sentence of Section 113 (a) (5) of the Revenue Act of 1932, her basis in every instance for determining gain or loss on the disposition of said property is the fair market value of these securities on the date of delivery to her by the trustees.

The securities sold in 1933 involve the following:

(1) \$16,000 face amount $4\frac{1}{4}\%$ bonds of April 15, 1972, City of New York. \$20,000 face amount $4\frac{1}{2}\%$ bonds of January 1, 1953, of the Federal Land Bank (Louisville). \$37,000 face amount $4\frac{1}{2}\%$ bonds of May 1, 1942, of the Federal Land Bank 166 (St. Paul). \$25,000 face amount $4\frac{1}{4}\%$ bonds of June 1, 1950, of the County of Westchester. \$25,000 face amount $4\frac{1}{4}\%$ bonds of June 1, 1959, of the County of Westchester. 272 shares common stock of American Telephone & Telegraph Company.

(2) 104 shares common stock of The Atchison, Topeka & Santa Fe Railway Co. 100 shares common stock of Northern Pacific Railway Company.

(3) 1,142 shares common stock of U. S. Steel Corporation. 100 shares common stock of Southern Pacific Company. 25 shares common stock of Southern Pacific Company. \$10,000 face amount $4\frac{1}{4}\%$ bonds of Sept. 1, 1960, of the City of New York. \$10,000 face amount $4\frac{1}{2}\%$ bonds 1963 of the City of New York.

(4) \$50,000 face amount 4% bonds of July 1, 1946, of City of Philadelphia. \$20,000 face amount $4\frac{1}{2}\%$ bonds of January 1933, of City of Rochester.

(5) 500 shares common stock of Niagara Hudson Power Corp. 125 option warrants of Niagara Hudson Power Corporation. 300 shares preferred stock of Buffalo, Niagara & Eastern Power Corporation.

167 (6) 8,500 shares common stock of F. W. Woolworth Company.

(7) 320 shares common stock of Hotels Statler Company, Inc.

(8) 184 shares Class B common stock of Niagara Share Corporation of Maryland.

The Commissioner presents that in respect to the securities purchased by the trustees the bases of such securities to the taxpayer were their respective cost to the trustees as provided by Section 113 (a) of the Revenue Act of 1932; that in respect to the securities purchased by the executors, that the bases to the taxpayer of such securities were their respective cost to the executors, as provided by Section 113 (a) of the Revenue Act of 1932, and, in the alternative, if Section 113 (a) (5) of said Act governs, as contended by taxpayer, then the bases to the taxpayer of such securities were their respective fair market values at the time they were formally transferred from the executors to the trustees on July 1, 1921, and not the time the securities were physically delivered to the taxpayer by the trustees. In respect to the securities owned by taxpayer's father at the date of his death, the Commissioner presents that the bases to the taxpayer of such securities were the fair market value of such securities at the time of death of taxpayer's father as provided by Section 113 (a) (4) of the Revenue Act of 1932, and in the alternative, if Section 113 (a) (5) of the Revenue Act of 1932 governs, as contended by taxpayer, the bases to the taxpayer of such securities were their fair market values at the time of their formal transfer from the executors to the trustees and not the time the securities were physically delivered to the taxpayer by the trustees.

168 The Board held that the securities were personal property acquired by will of her father and not by specific bequest, and that the third sentence of Section 113 (a) (5) of the Revenue Act of 1932 applies and not the general provisions of Section 113 (a) or Section 113 (a) (4) of said Act, and that accordingly the proper bases of the securities in the hands of the taxpayer for gain or loss are their fair market value on the respective dates physically delivered to the taxpayer by the trustees regardless whether the securities were owned by the father at the date of his death, or purchased by either the trustees or executors.

The position taken by the Board is contrary to the Bureau's position outlined in G. C. M. 14893 (1935) C. B. XIV-1, 202.

The position of the Commissioner may be summarized in respect to the securities listed above as follows:—

1. That Section 113 (a) of the Revenue Act of 1932 is applicable in determining the cost basis of securities purchased by the executors and by the testamentary trustees, which is cost to the executor and trustees, and is applicable to such securities as are listed under (1), (4), (5), and (8).

2. That Section 113 (a) (4) is applicable in determining the cost bases of securities sold by taxpayer, which cost is the value as of May 16, 1915, the date of death of taxpayer's father (of an equivalent number of shares), and is applicable to such securities as are listed under (2), (3), (6), and (7).

3. In the alternative that if Section 113 (a) (5) of the Revenue Act of 1932 is applicable, then the phrase "time of distribution to the taxpayer" means the date the securities were delivered by the executors to the trustees, and the fair market value on that date is the cost basis and is applicable to such securities as are listed under (2), (3), (4), (5), (6), and (7).

Questions presented:

1. Was the taxpayer's interest "vested" or "contingent" under the laws of New York?

2. In determining gain or loss under Section 113 (a) (5) of the Revenue Act of 1932, is the meaning of the phrase "the fair market value of the property at the time of the distribution to the taxpayer" (a) the date when the executors turned over the corpus of the trust to the trustees, or (b) the date of actual delivery by the trustees to the taxpayer?

3. As to securities purchased by the trustees with trust funds (subsequent to March 1, 1913), is the basis for determining gain or loss: (a) the cost to the trustees, or (b) the fair market value on the date of delivery by the trustees to the taxpayer?

4. As to securities purchased by the executors with funds of estate (subsequent to March 1, 1913) is the basis: (a) the cost to the executors, or (b) the fair market value on the date of delivery by the trustees to the taxpayer?

5. In respect to securities owned by the taxpayer's father at the date of his death (or the equivalent number of shares then existing), is the basis for determining gain or loss: (a) the fair market value at the time of death of taxpayer's father, or (b) the fair market value on the date of delivery by the trustees to the taxpayer?

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III

ASSIGNMENTS OF ERROR

That the Commissioner of Internal Revenue being aggrieved by the opinion and decision of the United States Board of Tax Appeals in these proceedings hereby petitions for a review of said opinion and decision by the United States Circuit Court of Appeals for the Second Circuit, and for the correction of the manifest errors which therein occurred and intervened to his prejudice.

The Commissioner's assignments of error are as follows:
The Board erred:

1. In holding and deciding that personal property delivered by trustees from the trust created by and in accordance with the will of taxpayer's father takes, as its basis for gain or loss in the hands of the taxpayer, its fair market value at the time of the delivery to the taxpayer by the trustees—regardless of whether the property was owned by the father at the time of his death, purchased by the executors, or purchased by the trustees.

2. In failing to hold and decide, where personal property was owned by taxpayer's father at the date of his death on May 16, 1915, and said property is transferred on July 1, 1921, or some other subsequent date, to a testamentary trust created by and in accordance with the will of taxpayer's father and said property is physically delivered to the said taxpayer by the trustees either on August 26, 1924, or August 26, 1931, that the basis of said property for gain or loss in the hands of the taxpayer is the fair market value of such property at the time of the death of taxpayer's father.

171 3. In failing to hold and decide, where personal property is purchased or acquired by the executors of taxpayer's father's estate and the said property is transferred on July 1, 1921, (or some other subsequent date) to a testamentary trust created by and in accordance with the will of the taxpayer's father and said property is physically delivered to the said taxpayer either on August 26, 1924, or August 26, 1931, by the trustees, that the cost basis of said property for gain or loss in the hands of the taxpayer is the same as the cost basis to the executors.

4. In failing to hold and decide, where personal property is purchased or acquired by testamentary trustees of a trust created by and in accordance with the will of taxpayer's father and said property is physically delivered to said taxpayer either on August 26, 1924, or August 26, 1931, by the trustees, that the cost basis of said property for gain or loss in the hands of the taxpayer is the same as the cost basis to the testamentary trustees.

5. In holding and deciding that the basis for determining gain or loss of the personal property herein delivered by the trustees from the trust created by and in accordance with the will of taxpayer's father is determined and governed by the third line of Section 113 (a) (5) of the Revenue Act of 1932.

6. In failing to hold and to decide that the basis for determining gain or loss of the personal property delivered by the trustees from the trust created by and in accordance with the will of taxpayer's father is determined and governed by the first sentence

of Section 113 (a) of the Revenue Act of 1932, where said property delivered by the trustees was acquired either by the trustees, or the executors before transfer to the testamentary trust.

172 7. In failing to hold and to decide that the basis for determining gain or loss of the personal property, delivered by the trustees from the trust created by and in accordance with the will of taxpayer's father is determined and governed by Section 113 (a) (4) of the Revenue Act of 1932, where said property delivered by the trustees was held by the father at the date of his death on May 16, 1915, and transferred by the executors of the father's estate to the testamentary trustees.

8. In holding and deciding that the "time of distribution to the taxpayer" within the meaning of Section 113 (a) (5) of the Revenue Act of 1932 is the date the trustees delivered the property as provided in the will to the taxpayer, to-wit, on August 26, 1924, and on August 26, 1931.

9. In failing to hold and decide that "the time of distribution to the taxpayer" within the meaning of Section 113 (a) (5) of the Revenue Act of 1932 is the date the executors transferred the property as provided in the will to the testamentary trustees for the benefit of the taxpayer.

10. In failing to hold and decide that the taxpayer realized gains and sustained losses on the disposition of the personal property physically received from the trustees on the respective dates of August 26, 1924 and August 26, 1931, measured by the difference between the sales prices and bases claimed by the Commissioner on the respective properties disposed of in 1933.

11. In that the decision of the Board is contrary to the position of the Commissioner outlined in General Counsel's Memorandum 14893 (1935) C. B. XIV-1, p. 202.

12. The Board erred in that its conclusions of law are contrary and in conflict with its findings of fact.

173 13. The Board erred in finding and determining that there is no deficiency in tax liability due from the taxpayer for the year 1933.

14. The Board erred in failing to find and determine that there is a deficiency in tax liability due from the taxpayer for the year 1933 in the amount of \$90,000.00, (plus any and all additional amounts which may result from the correction of the errors set forth herein).

Wherefore, the Commissioner petitions that said findings of fact and opinion and decision of the United States Board of Tax Appeals be reviewed by the Circuit Court of Appeals for the Second Circuit; that a transcript of the record be prepared in accordance with the law and the rules of said court and be

transmitted to the Clerk of said court for filing and that appropriate action be taken to the end that the errors herein complained of may be reviewed and corrected by said court.

(Sgd.) SAMUEL O. CLARK, Jr.,
Assistant Attorney General.

(Signed) J. P. WENCHEL,
R. L. W.
J. P. Wenchel,
*Chief Counsel,
Bureau of Internal Revenue.*

Of Counsel:

CLAUDE R. MARSHALL,
*Special Attorney,
Bureau of Internal Revenue.*

174 [Duly sworn to by Claude R. Marshall; jurat omitted in printing.]

175 In United States Circuit Court of Appeals for the Second Circuit

B. T. A. Docket No. 84640

[Same title.]

Notice of filing petition for review

Filed Sept. 30, 1939

To R. M. ANDREWS, Esq.

Marine Trust Building, Buffalo, New York.

You are hereby notified that the Commissioner of Internal Revenue did, on the 22d day of September 1939, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 22d day of September 1939.

(Signed) J. P. WENCHEL,

R. L. W.

J. P. Wenchel,

*Chief Counsel,
Bureau of Internal Revenue.*

176 Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 25th day of September 1939.

(Sgd.) RALPH M. ANDREWS,
Counsel for Respondent on Review.

177 In United States Circuit Court of Appeals for the Second Circuit

B. T. A. Docket No. 84640

[Same title.]

Notice of filing petition for review

Filed Sept. 30, 1939

TO JOHN L. KENEFICK, Esq.,
Marine Trust Building, Buffalo, New York.

You are hereby notified that the Commissioner of Internal Revenue did, on the 22d day of September 1939, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 22d day of September 1939.

(Signed) J. P. WENCHEL,
R. L. W.
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

178 Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 25th day of September 1939.

(Sgd.) JOHN L. KENEFICK,
Counsel for Respondent on Review.

104 GUY T. HELVERING VS. DOROTHY K. G. ROGERS

179 In United States Circuit Court of Appeals for the Second
Circuit

B. T. A. Docket No. 84640

[Same title.]

Notice of filing petition for review

Filed Sept. 30, 1939

TO DOROTHY K. G. ROGERS,

706 Marine Trust Bldg., Buffalo, New York.

You are hereby notified that the Commissioner of Internal Revenue did, on the 22d day of September 1939, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error, as filed is hereto attached and served upon you.

Dated this 22d day of September 1939.

(Signed) J. P. WENCHEL,
R. L. W.

J. P. Wenchel,

Chief Counsel,

Bureau of Internal Revenue.

180 Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 26 day of September 1939.

(Sgd.) DOROTHY K. G. ROGERS,
Respondent on Review.

181 In United States Circuit Court of Appeals for the
Second Circuit

B. T. A. Docket No. 84640

[Same title.]

Notice of filing petition for review

Filed Sept. 30, 1939

TO ERNEST J. BROWN, Esq.;

Marine Trust Building, Buffalo, New York.

You are hereby notified that the Commissioner of Internal Revenue did, on the 22d day of September 1939, file with the Clerk

of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 22d day of September 1939.

(Signed) J. P. WENCHEL,

R. L. W.

J. P. Wenchel,

Chief Counsel,

Bureau of Internal Revenue.

182 Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 25th day of September 1939.

(Sgd.) ERNEST J. BROWN,

Counsel for Respondent on Review.

183 In United States Circuit Court of Appeals for the Second Circuit

B. T. A. Docket No. 84640

[Same title.]

Amended praecipe for record

Filed October 21, 1939

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit, and deliver to the Clerk of the United States Circuit Court of Appeals for the Second Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Second Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of proceedings before the Board.
2. Pleadings before the Board:
 - (a) Petition, including annexed copy of deficiency letter.
 - (b) Answer.
 - (c) Reply.
 - (d) Amendments of Petition.
 - (e) Answer to Amendments of Petition.
 - (f) Reply to Answer to Amendments of Petition.

3. Stipulation of Facts and Exhibit A attached thereto.

4. Respondent's Exhibit A (Decree).

5. Memorandum opinion of the Board.

6. Decision.

184 7. Petition for review, together with proof of service of notice of filing petition for review and of service of a copy of petition for review.

8. Orders enlarging time for the preparation of the evidence and for the transmission and delivery of the record.

9. This praecipe (amended).

Said transcript to be prepared, certified, and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Second Circuit.

(Signed) J. P. WENCHEL,

R. L. W.

J. P. Wenchel,

Chief Counsel,

Bureau of Internal Revenue.

Receipt of a copy of the above-described amended praecipe for record is acknowledged and agreed to this — day of October 1939.

(Sgd.) John L. Kenefick,

Attorney for Respondent on Review.

CRM/csl 10/17/39.

(Sgd.) RALPH M. ANDREWS,

(Sgd.) ERNEST J. BROWN,

Attorneys for Respondent on Review.

[EMBLEM]

185 [Clerk's certificate to foregoing transcript omitted in printing.]

186 In United States Circuit Court of Appeals for the Second Circuit

Nos. 41-257-258-259—October Term, 1939

(Argued February 15, 1940.—Decided June 10, 1940)

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

RICHARD VAN NEST GAMBRILL, RESPONDENT

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

MARJORIE K. CAMPBELL, RESPONDENT

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

SEYMOUR H. KNOX, RESPONDENT

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

DOROTHY K. G. ROGERS, RESPONDENT

187 Petitions by the Commissioner of Internal Revenue to review determinations of the United States Board of Tax Appeals in respect to income taxes of the respondents Gambrill and Knox for the year 1930, and of the respondents Campbell and Rogers for the year 1933. Affirmed.

Before SWAN, AUGUSTUS N. HAND, and PATTERSON, Circuit Judges.

Sewall Key, Acting Assistant Attorney General, J. L. Monarch, and Newton K. Fox, Special Assistants to the Attorney General, Counsel for the Commissioner of Internal Revenue in the proceeding against the respondent Gambrill. Samuel O. Clark, Assistant Attorney General, Sewall Key and Arthur A. Armstrong, Special Assistants to the Attorney General, Counsel for the Commissioner of Internal Revenue in the proceedings against the respondents Campbell, Knox, and Rogers. Sidney W. Davidson, Ben R. Clark, and Allin H. Pierce, Counsel for the respondent Gambrill. James McCormick Mitchell, John L. Kenefick, and Ralph M. Andrews, Counsel for the respondents Campbell, Knox, and Rogers.

188

✓ *Opinion*

AUGUSTUS N. HAND, Circuit Judge:

The foregoing proceedings all involve the correctness of income tax assessments by the Commissioner of Internal Revenue and in each the Commissioner has appealed from decisions of the Board of Tax Appeals modifying his assessments.

In the Gambrill case the Commissioner assessed an income tax deficiency of \$11,753.40 for the year 1930, while the Board of Tax Appeals determined that there was an overpayment of \$75.60 by the taxpayer. In the Knox case the Commissioner assessed a deficiency for the same year of \$35,645.83 while the Board determined that there was a deficiency of \$42,842 (arising, however, from adjustments not here in issue). In the Campbell case the Commissioner assessed an income tax deficiency of \$86,937.47 for the year 1933, and in the Rogers case a deficiency of \$65,549.60 for the same year. The Board found that there was no income

tax deficiency on the part of either Campbell or Rogers. We think that its orders in all four proceedings should be affirmed.

In each of the above cases the taxpayer involved was given a remainder interest in a trust created by will. Certain personal securities that were a part of the corpus of the particular trust were delivered by the trustee to the taxpayer after the right to possession became fixed by the termination of the prior beneficial estate. Some of these securities were acquired by the testator during his lifetime, some of them were purchased by the executor after the testator's death before setting up the trust, and some were purchased by the trustee after the trust was established. Securities derived by the trustee in the various ways mentioned were delivered by him to the taxpayer and sold by the latter.

189 In assessing income taxes upon alleged profits realized by the taxpayer the Commissioner used the following bases for computing gains: In the case of securities which had been owned by the decedent, their fair market value at the time when distributed by the executor to the trustee; in the case of securities purchased by the executor or trustee, the cost to such fiduciary; in respect to certain securities purchased by a fiduciary prior to March 1, 1913, as in Gambrill's case, the value on that date, whenever cost was unknown. The Board of Tax Appeals, however, took the view that, because of the provisions of Section 113 (a) (5) of the Revenue Acts of 1928 and 1932, the proper basis in all cases was the fair market value of the securities at the "time of the distribution to the taxpayer" by the trustee, no matter when or how the trustee or the executor might have derived the particular securities.

In determining how long a taxpayer had held securities for the purpose of computing capital gain or loss under Section 101 of the Revenue Act of 1928 the Board used the dates of delivery of the securities by the trustee to the taxpayer. The Commissioner, on the other hand, used the date of the death of the testator as the beginning of the period of holding securities owned by the latter and the date of purchase by the fiduciary as the beginning in cases where securities were purchased by the executor or trustee.

We agree with the conclusion of the Board that Sections 113 (a) (5) of the Revenue Acts of 1928 and 1932 govern the computation of loss or gain in the cases before us. The pertinent provisions read as follows:

"(a) Property acquired after February 28, 1913.—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

90 “(5) Property Transmitted at Death.—If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer. In the case of property transferred in trust to pay the income for life to or upon the order or direction of the grantor, with the right reserved to the grantor at all times prior to his death to revoke the trust, the basis of such property in the hands of the persons entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust instrument had been will executed on the day of the grantor's death; * * *

None of the securities involved in the cases before us were acquired “by specific bequest” or were “acquired by the decedent's estate from the decedent.” They were all directly acquired from testamentary trustees. Accordingly the basis was not “the fair market value of the property at the time of the death of the decedent.” Therefore the third clause of Section 113 (a) (5) which embraces “all other cases” of property acquired by will is controlling. That clause provides that: “In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer.”

91 The words “the property” in the foregoing sentence seem inevitably to relate to the particular property sold by the taxpayer to whom it was distributed by the trustee. The term “taxpayer” is defined by Section 701 (a) (13) of the Revenue Acts of 1928 and 1932 as “any person subject to a tax imposed by this Act.” It is hard to imagine language which would more clearly fix the basis for computing the gain or loss realized upon the sales of the securities with which the Commissioner had to deal than the words “fair market value of the property at the time of the distribution to the taxpayer.”

Perhaps the most strenuous objection made by the Commissioner to adopting what seems to be the clear meaning of the statute is that increment in value between the date of the decedent's death and the time of distribution to the taxpayer is not subjected to taxation when the securities are sold and thus tax resources are impaired. But it is frequently true that increments are not subjected to taxation. One common case

where increment in value is disregarded is that which occurs during the lifetime of an owner of securities which are not sold by him but are sold after his death by his executors, administrators, trustees, or remaindermen under his will. Such an increment accruing during the lifetime of the owner of securities has never been taken into account in computing gain or loss upon sales after his death. Increment between the date of death of the owner of securities and the date of distribution by an executor to a legatee is also to be disregarded under the third clause of Section 113 (a) (5) in the case of distribution of securities which are transmitted by virtue of a general bequest.

The supposed loss in revenue due to a disregard of fluctuations in the market value of securities between the date of death and the time of distribution is moreover somewhat fanciful, ¹⁹² for in all cases where the property depreciates in value between the date of death and the date of distribution a larger tax would result from fixing the basic value at "the time of the distribution to the taxpayer" than from fixing the basis at the time of the testator's death.

The further contention of the Commissioner that the word "taxpayer" as used in the third clause of Section 113 (a) (5) should be construed as meaning the "trustee" and that the phrase "time of the distribution to the taxpayer" ought to be interpreted as meaning "the date when the executors transferred the property to the trustees," seems to us without warrant. The taxpayers here are undoubtedly the respondents. The trustees are separate entities and as such are neither agents of the respondents nor mere passive fiduciaries. It is true that under certain circumstances they might themselves have become taxpayers in respect to the corpus of their trusts, but only in case they had made sales of some of the securities composing the corpus—not, as here, when without making any sales they wound up their trusts and distributed the corpus to remaindermen. To treat the trustee and beneficiary-remainderman, as the Commissioner wishes us to do, as a "sort of dual tax personality" is to disregard the plain language of the statute and to adopt a concept which seems to us to defy analysis. In view of the clear terms of the third clause of Section 113 (a) (5) it can make no difference whether the interest of any remaindermen be vested, vested subject to be divested, or contingent. In either event the basis should be "the fair market value at the time of the distribution to the taxpayer," i. e., to the respondent whose income taxes are being reviewed, and not to the trustee.

In respect to the securities purchased either by the executors or trustees the Commissioner says they do not come within the

193 third clause of Section 113 (a) (5) because they were not acquired by will. This requires a most technical interpretation of the clause and one that in our opinion is not sound even technically. Any property distributed by a trustee which is part of the corpus of the trust is acquired through and by virtue of the will. Through the will the remaindermen derived all their interests and without it they would have had no standing and would have received nothing. *Lyeth v. Hoey*, 305 U. S. 188, 194-195.

It is further argued that the Senate Report in respect to the enactment of Section 113 (a) (5) in the 1928 Act justified the Commissioner's interpretation of the statute. In dealing with the third clause the report said: "It would also apply in cases where the executor purchases property and distributes it to the beneficiary." There is, however, no reason because of this mention of purchases by the executor for limiting the application of the report to property so purchased. In cases where a trust has been created by will the executor will often act as trustee before the trust is actually set up and sometimes will sell and purchase securities on behalf of the trust. Indeed the statement in the Senate Report would not cover the particular facts before us except in situations where the executor so acted.

The Commissioner apparently contends that the decision in *Brewster v. Gage*, 280 U. S. 327, fixing the date of death as the time when property should be valued under the provisions of the Revenue Act of 1921, for the purposes of computing gain or loss, affords some guide in interpreting Section 113 (a) (5). The difficulty in maintaining such a contention is that Section 113 (a) (5) is specific, that it fixes a different date for valuing acquisitions of property from that of the Act of 1921, and that the opinion in *Brewster v. Gage* says at page 337: "The deliberate selection of language so differing from that used in the earlier acts indicates that a change of law was intended."

194 In *United States v. Nostrand*, 94 F. (2d) 510, and *Commissioner v. Libbey*, 100 F. (2d) 458, the Court of Appeals of the First Circuit held that the basis for computing gain or loss to the taxpayer was the market value of the property at the time of distribution by the trustee to the remaindermen, and not the value at the time of distribution by the executor to the trustees. These decisions, rather than that of the Seventh Circuit in *Commissioner v. Maguire* rendered on March 5, 1940, are in accord with our view.

The second question is whether the securities passing to the respondents Gambrill and Knox were held by them for more than two years and hence whether any gain or loss realized by the sale was taxable not as ordinary income or loss but as a capital gain or loss because the securities were "capital assets" as defined in Section 101 (c) (8) and (B) of the Revenue Act of 1928. The Board held that they were not, and they plainly were not unless the period during which they were held by the trustees can be added to the period between the date of distribution to the taxpayers and the date of sale. There cannot be any such tacking because the property, when held by the respective respondents did not have "for the purpose of determining gain or loss from a sale * * *, the same basis * * * in his hands as it would have in the hands" of the trustees.

On behalf of the Commissioner it is argued that the decision of the Supreme Court in *McFeeley v. Commissioner*, 296 U. S. 192, requires us to find that the securities had been held from the date of death and that they, therefore, were held for more than two years prior to sale. That decision, however, involved an estate where there was no trust. The court only decided that the general legatee held the securities which were transferred to him by the executor from the date of death. We agree with the Board that the intervening trusts broke the continuity so that the taxpayer only held the securities from the time they were distributed to him.

195 In the *Campbell* case certain Woolworth stock was purchased by the taxpayer prior to distribution to her by the trustees of other shares of the same kind. If she did not hold the shares she acquired under the will until they were distributed to her by the trustee, under the "first-in-first-out" rule, her own shares should be treated as sold prior to those which were delivered to her by the trustee. We agree with the Board that her own shares must be regarded as sold first. During the time that the title to the shares remained in the trustee the taxpayer had no control over their disposition and they were not acquired until she obtained them as her own. *Helvering v. San Joaquin Fruit & Investment Co.*, 297 U. S. 496.

The orders of the Board of Tax Appeals are affirmed.

196 In United States Circuit Court of Appeals, Second
Circuit

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

DOROTHY K. G. ROGERS, RESPONDENT

Appeal from the United States Board of Tax Appeals

Judgment

Filed June 29, 1940

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said Board in accordance with this decree.

D. E. ROBERTS, *Clerk.*

197 [File indorsement omitted.]

198 [Clerk's certificate to foregoing transcript omitted in
printing.]

199 Supreme Court of the United States

Order allowing certiorari

Filed November 12, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.